United States Court of Appeals

for the Second Circuit

APPENDIX

75-7313

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

P/S

PRESCOTT H. RATHBORNE, Plaintiff-Appellant -against- S. GARFINKEL and 873 THIRD AVENUE CORP., Defendants-Appellees, -and- CITADEL MANAGEMENT CO., INC., URBAN RELOCATION CO., INC., EDWIN J. GLICKMAN, ODYSSEY HOUSE, INC., and SALBIAN REALTY CO., INC., Defendants.	DOCKET NO. 75-7313

JOINT APPENDIX

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Attorney for Plaintiff-Appellant

******

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Attorney for Defendants-Appellees

UNITED STATES COURT OF APPEALS
FILED
JUL 16 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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CA

CIVIL DOCKET
UNITED STATES DISTRICT COURT

73 Civ. 612

Jury demand date:

D. C. Form No. 106 Rev.

JUDGE DUFFY

TITLE OF CASE

RESCOTT H PATHBORNE
vs
ITADEL MANAGEMENT CO. INC. 8-22-74
RBAN RELOCATION CO, INC. 8-22-74
. GARFINKEL 1-28-75
DWIN J. GLICKMAN 8-22-74
DYSSEY HOUSE, INC. 3-28-74
73 THIRD AVE CORP. 4-28-75
ALBIAN REALTY CO, INC. 8-22-74

ATTORNEYS

For plaintiff:

~~BRADLEY D. DAVIS~~
~~1235 PARK AVE~~
~~NEW YORK, N.Y. 10028~~
~~876-1609~~

Howard L. Jacobs - (11-16-73)
401 Broadway, NYC 10013 - 431-3710-1

For defendant:

Nickerson, Kramer, Lowenstein, Nessen and Kamin 919 Third Ave, NYC for defts Salbian Realty Co. Inc. an Edwin J. Glickman

~~Schwartz, Rothman and Neufield~~
~~350 Fifth Ave, NYC 868-0950~~
~~for Citadel Management Co. Inc. and Urban Relocation Co. Inc.~~

Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Avenue
N.Y. N.Y; 10022
For Odyssey House Inc.
(3-28-74)

Turchin & Topper (defts. Citadel & Urban)
60 E. 42nd St., NYC 10017 - MO 1-0420

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
JS. 5 mailed X	Clerk		2/7/73	B.B. Davis	15 —	
			2/9/73	S. Lee		15 —
JS. 6 mailed ✓	Marshal					
Basis of Action: CONSTITUTIONAL RIGHTS-VIOLATED, CONSIPRACY and HARASSMENT $1,000,000.00	Docket fee					
	Witness fees					
Action arose at:	Depositions					

CESCOTT H. RATHBORNE vs CITADEL MANAGEMENT CO, et al

73 CIV. 1272

PAGE 1

DATE	PROCEEDINGS	Date Order or Judgment Noted
7-73	Filed complaint and issued summons.	
15-73	Filed stip & order that the time for the defts Citadel Management, Inc, Urban Relocation Co, Inc. & Edwin J. Glickman & Salbian Realty, Co. to answer the complaint is extended to 3/26/73, So Ordered Brieant J.	
21-73	Filed summons with marshals ret, see return.	
22-73	Filed defts Citadel Management, Co. Edwin J. Glickman; & Urban Relocation, Inc. & Salbian Realty Co,'s Notice to ~~tk~~ take deposition of the pltff. on 4/9/73	
27-73	Filed Pltffs REPLY to the Counterclaims of deft. 873 Third Ave Corp.	BBD
30-73	Filed Stip and Order that the time for defts Citadel Management Co., Inc. Urban Relocation Co.,Inc.Edwin J. Glickman and Salbain Realty Co.Inc. to answer is extended to 4-9-73 and that the deposition of pltff as previously notices, for 4-9-73 is adj'd to 4-23-73. BRIEANT,J.	
2-73	Filed Stip and Order that Miekerson,Kramer,Lowenstein,Newwen and Kamin is substituted in place and instead of Golenbock and Barell, as attys for defts Salbian Realty Co.Inc. and Edwin J. Glickman and that Schwartz,Rothaman and Newfield be substituted in place and instead of Golenbock and Barell as attys for deft Citadel Management Co.Inc. and Urban Relocation Co.Inc. BRIEANT,J.	
3-73	Filed Stip and Order that the time for deft Odyssey House,Inc. to answer the complaint is extended from 4-3-73 to 4-17-73.BRIEANT,J.	
r5-73	Filed Stip and Order that the time for defts, Citadel Management Co.Inc. and Urban Relocation Co.Inc. to answer the complaint is extended to 4-16-73. BRIEANT,J.	
r9-73	Filed pltff's notice of motion re: dismissal of the counterclaim ret. 4-23-	
r.20-73	Filed Deft Odyssey House Inc ANSWER cross-claim & counterclaim.	P.W.R.W,
r.16-73	Filed Stip & Order that the deposition of pltff is adjourned from 4-23-73 to 5-17-73. So Ordered 4-13-73 BRIEANT, J.	
r.16-73	Filed Defts Citadel Management Co Inc & Urban Relocation Co Inc Amended answer & cross-claims.	S.R.&.N.
r 2-73	Filed defts Edwin J. Glickman & Salbian Realty Co, Inc's request to produce documents of deft. 873 Third Ave Corp. & S. Garfinkel.	
r 2-73	Filed deft. Edwin J. Glickman & Salbian Realty Co, Inc's request to produce documents of the pltff.	
pr 2-73	FILED: Filed deft. Edwin J. Glickman & Salbian Realty Co, Inc's ANSWER to the cross claims	MAINEK
r 2-73	Filed deft. Edwin J. Glickman & Salbian Realty Co, Inc's notice to take deposition of deft. S. Garfinkel on 5/8/73.	
r 5-73	Filed deft. Edwin J. Glickman & Salbian Realty Co, Inc's Interrogatories addressed to the deft. 873 Third Ave.	
pr 9-73	Filed Pltffs reply to deft. Glickman's counterclaim.	
r 11-73	Filed defts Citadel Management Co, Inc's & Urban Re-Location Co's ANSWERto the cross-claims & counterclaims.	SR&N
pr 23-73	Filed stip and order that the pltffs motion is adjourned until 4/27/73. So Ordered Brieant J.	
pr 24-73	Filed Pltffs REPLY to the counterclaims of deft. Odyssey House.	BBD
Apr 27-73	Filed deft. Edwin J. Glickman & Salibian Realty Company, Inc affidavit in oppoistion by Edwin J. Glickman.	
pr 27-73	Filed deft. Glickman & Salbian Realty Co, memo of law in opposition.	
Apr 30-73	Filed stip and order that the deposition of deft. 873 Third Ave, Corp. is adjourned until 5/22/73, So Ordered Brieant J.	
5-8-73	Filed memo endorsed on motion to dismiss counterclaim of deft. Glickman dated April 9,1973,motion denied without prej. to renew on the same or other grounds after discovery has been completed. So ordered,Brieatn,J.m/n	

cont'd on page 2

Civ. 6[illegible] Prescott H. Rathborne -v- Citadel Management Co., et al 73 Civ. 6[illegible] CCA

CIVIL DOCKET Page 2 BRIEANT, J.

DATE	PROCEEDINGS
Nov. 16-73	Filed affdvt. stip. & order substituting atty. for pltff.--brieant,J.
JAN 8-74	Pre-trial conference held
Mar. 28-74	Filed consent order substituting attys. for defts. Citadel Management Co. & Urban Relocation Co., Inc.--Brieant,J.
Apr.5-74	Filed defts. Citadel Management interrogatories.
May 16-74	Filed pltfs. request to produce documents.
May 16-74	Filed pltfs. notice of depositions of defts.
May 16-74	Filed pltfs. Answers to interrogatories.
Jul.30-74	Filed Consent Order that action is discontinued without prejudice as to deft Odyssey House only, which is dropped as a party.....BRIEANT,J.
Aug.27-74	Filed Stipulation of Settlement & Order of discontinuance as to certain named defts only, namely Citadel Manag'mt, Urban, Glickman & Salbian.....BRIEANT,J.
Oct.1-74	Filed transcript of proceedings.
OCT 21-74	NON-JURY TRIAL BEGUN HELD (BEFORE BRIEANT J. AND SOLOMON)
OCT 22-74	TRIAL CONTD & CONCLUDED (2 DAYS) JUDGE'S DECISION RESERVED
4-28-75	Filed Judgment that pltff's action against the defts is dismissed and that deft. Garfinkel take nothing against pltff. on his counterclaim. No Costs. .....Solomon, J. mn
4-28-75	Filed Opinion#42325.....The evidence does not support Garfinkel's claim for $8,200, which he contnds he paid to clean the apartment. Nevertheless, under the lease Rathborne is liable to Garfinkel for $500. for failing to give 30 days notice before he vacated. This may be set off against Rathborne's $500. deposit which Garfinkel kept. This opinion shall xxx constitue findings of fact and conclusions of law in accordance with FRCP 52(a). A Judgment in accordance with this opinion may be entered....Solomon,J.
5-21-75	Filed Pltff's Notice of Appeal to USCA from Order ent. 4-24-75(fld 4-28-75)
6-2-75	Copies of notices mailed on 5-23-75 to:max Steinberg, Esq. 6East 45 StNYC Filed Notice to docket Clerk that the record has been certified and transmitted to USCA on 6-2-75..
6-10-75	Filed transcript of record of proceedings, dated Oct 21, 22-1974 Vol 1
	Filed transcript of [illegible] dated Oct 21, 22-74 Vol 2
6-9-75	Filed Notice to Docket Clerk that the Record has been certified & transmitted to USCA on 6-19-75.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

PRESCOTT H. RATHBORNE,

Plaintiff,

-against-

CITADEL MANAGEMENT CO., INC., URBAN RELOCATION CO., INC., S. GARFINKEL, EDWIN J. GLICKMAN, ODYSSEY HOUSE, INC., 873 THIRD AVENUE CORP. and SALBIAN REALTY CO., INC.,

COMPLAINT

Defendants.

----------x

Plaintiff, for his complaint, by BRADLEY B. DAVIS, his attorney, respectfully alleges as follows:

JURISDICTIONAL ALLEGATIONS

1. At the time of the commencement of this action, plaintiff is a citizen of the United States and a resident of the State of Louisiana.

2. Upon information and belief, at all times hereinafter mentioned, the defendants are residents of the State of New York, within the jurisdictional area of the Southern District Court.

3. Upon information and belief, at all times hereinafter mentioned, the defendant corporations were and still are domestic corporations with their office and principal place of business in the City, County and State of New York.

4. Jurisdiction lies in this Court under the provisions of 28 U.S.C. 1332, because there is complete diversity of citizenship between plaintiff and defendants and more than $10,000 is in dispute.

5. Venue lies in this Court because defendants are located within the State of New York and, upon information and belief, within the Southern District area.

AS AND FOR A FIRST CAUSE OF ACTION

6. Heretofore, and between 1966 and November, 1972, plaintiff resided in a rent controlled apartment at 200 East 53rd Street, Manhattan (hereinafter "premises").

7. Upon information and belief, at least since early 1973, the premises have been owned by defendant SALBIAN.

8. Upon information and belief, defendant SALBIAN is in fact a corporate creation of defendant GLICKMAN, employed to cloak his ownership of this property for reasons hereinafter set forth.

9. Upon information and belief, defendant 873 THIRD AVENUE CORP. is the lessee of the premises, pursuant to a written agreement.

10. Upon information and belief, defendant GARFINKEL is the principal stockholder and controlling person behind defendant 873 THIRD AVENUE CORP.

11. Upon information and belief, prior to 1972, defendant GLICKMAN determined to assemble various properties on the block where plaintiff's prmises are located in order to construct a large office building on that block.

12. Thereafter, and prior to 1972, defendants GLICKMAN, CITADEL, URBAN and ODDYSSEY HOUSE entered into a conspiracy to illegally drive plaintiff and other rent controlled tenants from the block so that they might vacate buildings, demolish them and construct the aforesaid office building.

13. In furtherance of the aforesaid conspiracy, upon information and belief, all defendants entered into a conspiracy to drive plaintiff from his residence at the aforesaid premises.

VI A

14. In furtherance of the conspiracy, defendants performed at least the following illegal acts:

- Location of eight purported "drug rehabilitation" centers administered by defendant ODYSSEY HOUSE, although the area was not a high drug-use area;

- Posting of ungainly signs and unnecessary tinning of windows to make the block unattractive and dangerous for living;

- Depriving plaintiff of heat, electrical and other vital services;

- Petitioning to decontrol plaintiff's apartment on various improper grounds;

- Threatening plaintiff's life and property, specifically including the axing of plaintiff's front door on June 27, 1972;

- Refusing to provide a secure lock at the entrance to the building where plaintiff resided;

- Refusing to provide plaintiff with an operational door buzzer system;

- Refusal to make repairs to his apartment when needed;

- Placing garbage in the hall in front of plaintiff's apartment and grease on the front door thereof;

- Refusing to paint plaintiff's apartment when due;

- Failing to provide adequate security for a half-vacated block containing a large number of "drug rehabilitation" centers placed there by defendants.

15. By reason of the above and many other acts of harassment, plaintiff suffered grievous mental anguish and incurred huge legal expenses in his effort to maintain his residence through the depredations of defendants.

VII.A

16. In November 1972, by reason of the harassment by the conspiring defendants, plaintiff was forced to vacate the premises.

17. Upon information and belief, the value of statutory tenancy rights to the premises at the time he was forced to vacate same was $100,000.

18. Furthermore, upon information and belief, the value of the garden terrace which plaintiff had constructed, as well as fixtures which plaintiff could not remove from the apartment when he was forced to vacate as aforesaid was $200,000.

19. Upon information and belief, all defendants, except defendants 873 THIRD AVENUE CORP, GARFINKEL and SALBIAN engaged in similar acts of harassment toward hundreds of other rent controlled tenants, both on this block and in other areas where they were engaged in similar assemblage efforts and are continuing to perform such harassment acts in such areas, all to the end of driving these tenants from their homes illegally.

20. Furthermore, these acts of harassment, by forcing plaintiff to vacate his home, deprived plaintiff of property without due process of law and deprived him of his right to privacy and quiet enjoyment of his home, all in violation of the Constitution of the United States and the State of New York.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS 873 THIRD AVENUE CORP. and S. GARFINKEL

21. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 6,9,10, and 15 through 20 with the same force and effect as if fully set forth herein at length.

22. Upon information and belief, at all times hereinafter mentioned, defendant 873 THIRD AVENUE CORP. operated as plaintiff's landlord.

VIII A

23. Heretofore, and prior to 1972, defendants 873 THIRD AVENUE CORP. and GARFINKEL determined to drive plaintiff out of his rent controlled apartment at 200 East 53rd Street, Manhattan for purposes of their economic gain.

24. Upon information and belief, in furtherance of this effort, said defendants performed the following acts of harassment against plaintiff:

- Depriving plaintiff of heat, electrical and other vital services;

- Petitioning to decontrol plaintiff's apartment on various improper grounds;

- Threatening plaintiff's life and property, specifically including the axing of plaintiff's front door on June 27, 1972;

- Refusing to provide a secure lock at the entrance to the building where plaintiff resided;

- Refusing to provide plaintiff with an operational door buzzer system;

- Refusal to make repairs to his apartment when needed;

- Placing garbage in the hall in front of plaintiff's apartment and grease on the front door thereof;

- Refusing to paint plaintiff's apartment when due.

WHEREFORE, plaintiff demands judgment against defendants and each of them in the following sums: (1) $100,000 for the value of his statutory tenance; (2) $200,000 for the value of property he was forced to abandon when he vacated the premises as aforesaid; (3) $25,000 for legal, psychiatric and other expenses; (4) $175,000 for severe mental anguish; (5) $500,000 for exemplary damages, together with appropriate interest and the costs and disbursements of this action.

BRADLEY B. DAVIS
Attorney for Plaintiff
1235 Park Avenue
New York, N.Y. 10028

FOLIO 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRESCOTT H. RATHBORNE,

Plaintiff,

-against-

CITADEL MANAGEMENT CO., INC., URBAN RELOCATION CO., S. GARFINKEL, EDWIN J. GLICKMAN, ODYSSEY HOUSE, INC., 873 THIRD AVENUE CORP. and SALBIAN REALTY CO., INC.

Defendants.

Civil Action File No. 73 Civ. 612

ANSWER

2

Defendants, S. GARFINKEL and 873 THIRD AVENUE CORP., by their attorney MAX STEINBERG, answering the complaint of the plaintiff herein, respectfully show to this court and allege:

ANSWERING THE JURISDICTIONAL ALLEGATIONS

FIRST: Deny having knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered 1 and 5.

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SECOND: Deny having knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered 2 and 3 except admit that S. GARFINKEL is a resident of the State of New York and 873 THIRD AVENUE CORP., is a domestic corporation having its principal place of business in the City, County and State of New York.

ANSWERING THE FIRST CAUSE OF ACTION

X A

FOLIO 4

THIRD: Deny the allegations contained in paragraphs numbered 6, 10, 13, 14, 15, 16, 17, 18, 19 and 20.

FOURTH: Deny having knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered 7, 8, 11 and 12.

ANSWERING THE SECOND CAUSE OF ACTION

FIFTH: Defendants make the same admissions and denials as to paragraphs numbered 6, 9, 10 and 15 through 20, referred to in paragraph numbered 21 as were made in the same numbered paragraphs alleged in the first cause of action.

SIXTH: Deny the allegations contained in paragraphs numbered 22, 23 and 24.

AS AND FOR A FIRST DEFENSE DEFENDANT 873 THIRD AVENUE CORP ALLEGES:

SEVENTH: That on or about the day of May, 1966 and the 31st day of December, 1967, plaintiff and defendant 873 THIRD AVENUE CORP. entered into written leases for apartments 4 and 5 in premises 873-875 Third Avenue, also known as 200 East 53rd Street, Borough of Manhattan, City of New York.

EIGHTH: That plaintiff, during his occupancy of apartments 4 and 5, and for his convenience, comfort and suitability, and without permission of defendant 873 THIRD AVENUE CORP., performed certain work in the subject apartments.

XC A

FOLIO 7

NINTH: That upon abandonment by plaintiff of said apartments 4 and 5 on November 18, 1972, without notice to defendant 873 THIRD AVENUE CORP. plaintiff failed to restore apartments 4 and 5 to their prior condition.

TENTH: That by reason of the acts and conduct of the plaintiff, defendant 873 THIRD AVENUE CORP. was compelled to and did spend the sum of $3,000.00 to restore the apartments 4 and 5 to a habitable condition.

AS AND FOR A SECOND DEFENSE DEFENDANT 873 THIRD AVENUE CORP. ALLEGES:

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ELEVENTH: That during the term of the statutory tenancy of the plaintiff, the State of New York enacted Chapter 323 of the Laws of 1971, effective May 1, 1972,which was enacted into Section 18 of the Rent and Eviction Regulations of the Housing and Development Administration, Department of Rent and Housing Maintenance, Office of Rent Control of the City of New York.

TWELFTH: That pursuant to Section 18, the defendant 873 THIRD AVENUE CORP. filed an application on or about July 20, 1972 with the Office of Rent Control to decontrol one of the apartments occupied by the plaintiff.

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THIRTEENTH: That plaintiff filed an answer to the application of 873 THIRD AVENUE CORP. with the Office of Rent Control and after due consideration, the application for decontrol of apartment 4 was granted.

FOURTEENTH: That thereafter plaintiff filed a

XII A

FOLIO 10

protest in accordance with the rules and regulations of the Office of Rent Control of the City of New York.

FIFTEENTH: That prior to a decision by the Rent Administrator, plaintiff voluntarily vacated both apartments 4 and 5 and the Office of Rent Control deemed the protest moot by reason of plaintiff's conduct and by order dated December 29, 1972 the Office of Rent Control dismissed the protest of the plaintiff.

AS AND FOR A THIRD DEFENSE
DEFENDANT 873 THIRD AVENUE
CORP. ALLEGES:

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SIXTEENTH: That on or about July 2, 1972, plaintiff filed a harassment proceeding with the Office of Rent Control against 873 THIRD AVENUE CORP., the subject of which was substantially based upon the allegations of plaintiff's complaint, and a hearing was held on plaintiff's harassment application by the Office of Rent Control.

SEVENTEENTH: That by reason of plaintiff's voluntarily vacating apartments 4 and 5 in premises 873

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873 Third Avenue, also known as 200 East 53rd Street, Borough of Manhattan, City of New York, plaintiff's harassment application is deemed denied by the Office of Rent Control.

AS AND FOR A FOURTH DEFENSE
DEFENDANT 873 THIRD AVENUE
CORP. ALLEGES:

EIGHTEENTH: That heretofore and on or about the 8th day of June, 1972 plaintiff commenced an action in

XIIIA

FOLIO 13

the Supreme Court of the State of New York, County of New York, against Munchtime U.S.A. and 873 THIRD AVENUE CORP. upon a verfied complaint.

NINETEENTH: That said action was basically upon the same facts as in the subject proceeding and the within matter is therefore res judicata.

TWENTIETH: That on the date set for trial by a Justice of the Supreme Court, plaintiff and his attorney failed to appear and the presiding justice of the part

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directed the clerk of the court to communicate with plaintiff's attorney, who in turn,notified the clerk of the part that he was discontinuing the action.

TWENTY-FIRST: That pursuant to order of the justice then presiding, the action was marked "discontinued".

AS AND FOR A FIFTH DEFENSE DEFENDANT 373 THIRD AVENUE CORP. ALLEGES:

TWENTY-SECOND: That this court has no jurisdiction of the subject of this action.

15

AS AND FOR A SIXTH DEFENSE AND BY WAY OF COUNTER-CLAIM AND SET-OFF DEFENDANT 873 THIRD AVENUE CORP. ALLEGES:

TWENTY-THIRD: That by reason of the default of the plaintiff in the observance, performance and compliance with the terms of the leases entered into between plaintiff and defendant 873 THIRD AVENUE CORP. and in accordance

XIIA

FOLIO 16

with the terms thereof, the plaintiff is indebted to the defendant 873 THIRD AVENUE CORP. in the sum of $5,000.00 for professional legal services rendered.

TWENTY-FOURTH: That plaintiff failed to give thirty (30) days' notice to the defendant 873 THIRD AVENUE CORP. of his intention to vacate apartment 5, in accordance with the Rent and Eviction Regulations of the Rent Control Law and in consequence thereof is liable to the defendant 873 THIRD AVENUE CORP. for rent for one month, in the sum of $250.00.

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TWENTY-FIFTH: That plaintiff failed to pay to the defendant 873 THIRD AVENUE CORP. rent in the sum of $500.00 for apartments 4 and 5 for the month of November, 1972.

WHEREFORE, defendants 873 THIRD AVENUE CORP. and S. GARFINKEL demand judgment dismissing the complaint and for judgment in favor of 873 THIRD AVENUE CORP. on its counterclaim in the sum of $8750.00, together with the costs and disbursements of this action.

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Dated: New York, March 13, 1973

MAX STEINBERG
Attorney for Defendants
873 Third Avenue Corp.
and S. Garfinkel
No. 6 East 45th Street
NewYork, NewYork 10017
MU. 2-1582

XVA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

PRESCOTT H. RATHBORNE, :

Plaintiff, :

vs. : 73 Civ. 612

CITADEL MANAGEMENT CO., INC., : OPINION
URBAN RELOCATION CO., INC.,
S. GARFINKEL, EDWIN J. :
GLICKMAN, ODYSSEY HOUSE, INC.,
873 THIRD AVENUE CORP., and :
SALBIAN REALTY CO., INC.,
:

Defendants.

- - - - - - - - - - - - - - - - - - - X

Howard L. Jacobs,
401 Broadway,
New York, N. Y. 10013,

Attorney for Plaintiff.

Max Steinberg,
6 East 45th Street,
New York, N. Y. 10017,

Attorney for Defendants
S. Garfinkel and 873 Third
Avenue Corp.

SOLOMON, Judge:

This is an action for wrongful eviction. Rathborne charges that Garfinkel, his landlord, harassed him into vacating his apartment, and he claims more than $200,000.00 in damages. Garfinkel denies responsibility for the events which caused Rathborne to vacate and counterclaims for the cost of cleaning the apartment and one month's rent.

Rathborne was the lessee of two apartments (apartment 4 and apartment 5) at 200 East 53rd Street, New York City. Apartment 4 is the third story of the building and apartment 5 is the fourth floor. The lease for apartment 5 was signed in December, 1965. The lease for apartment 4 was signed in June, 1966. The lease for apartment 4 provided tha

XVI A

Rathborne had the exclusive use of the roof of the two-story building which adjoined his building (the adjoining roof), and allowed him to improve the adjoining roof. Each lease was for two years. Because the building was rent-controlled, Rathborne was entitled to remain in the apartments after the leases expired at the same rental and on the same terms subject only to changes authorized by the Rent Control Commission.

During the early part of the tenancy, Rathborne's relations with Garfinkel were satisfactory. Beginning in 1970, the relationship deteriorated. A number of incidents involving the tenancy occurred, and in November, 1972, Rathborne vacated his apartment.

Under New York law, constructive eviction occurs when a landlord's grossly insulting and threatening conduct seriously and substantially deprives the tenant of quiet enjoyment of his premises, and as a result, the tenant vacates his premises within a reasonable period of time. Barash v. Pennsylvania Terminal Real Estate Corp., 26 N.Y.2d 77, 256 N.E.2d 707, 710 (1970); Gillingham v. Goldstone, 21 Misc.2d 690, 197 N.Y.S.2d 237, 238 (Munic. Ct., Bronx Co. 1959). To prove constructive eviction, Rathborne must prove that he vacated because of Garfinkel's wrongful acts and that he vacated within a reasonable time after the wrongful acts occurred. I find that Rathborne failed in such proof.

Rathborne contends that Garfinkel threatened him. I find that these so-called threats were provoked by Rathborne. For example, Rathborne charges that, in the chambers of a state court judge, Garfinkel called Rathborne a bigot and threatened to "get him". But Garfinkel did this only after Rathborne insulted Garfinkel.

I find that Rathborne was a constant source of irritation

FPI-Sandstone
8-26-68-84M-4291

and continually provoked Garfinkel. Rathborne should have anticipated that Garfinkel would react to his remarks.

I also find that much of what Rathborne characterizes as threats did not amount to threats. They were merely predictions of difficulties that Rathborne would encounter unless he changed his attitude and his actions. For example, Garfinkel believed that Rathborne's door had been axed by one of Rathborne's former guests whom Rathborne had thrown out. Garfinkel also believed that Rathborne's problems stemmed primarily from his dispute with Munchtime, another Garfinkel tenant, which operated a fast food service on the ground floor. Munchtime had installed an air conditioner on the adjoining roof in 1966. It had the right to install the air conditioner under a lease which predated Rathborne's leases, and Rathborne did not object to its installation. Later, Rathborne began to deny Munchtime access to the adjoining roof.

Rathborne contends that Garfinkel intentionally turned off his electricity for six weeks in June and July, 1972. Rathborne's fuse box was in Munchtime's basement. Rathborne's air conditioners were continually blowing his own fuses. Then, when Rathborne refused Munchtime access to the adjoining roof, Munchtime reacted by refusing Rathborne access to the fuse box. Garfinkel was unsuccessful in his attempt to resolve the dispute because Rathborne was intransigent. Garfinkel was angry and complained that Rathborne would do nothing to settle the dispute. I find that Rathborne failed to prove intentional misconduct by Garfinkel.

Finally, even though Garfinkel failed to promptly repair Rathborne's buzzer, this failure was insufficient to constitute a constructive eviction.

In 1968, the character of the neighborhood began to

FPI-Sandstone
8-36-4V-1M-4291

deteriorate greatly. There was an attempt by a developer to "assemble" (completely purchase) the block in which Garfinkel's building was located. The developer bought other buildings and then left them vacant. Drug rehabilitation centers moved into the block. Vandalism and street crimes increased; transients and addicts frequented the streets. Rathborne introduced no evidence to show that Garfinkel participated in the attempt to assemble the block or was responsible for the change in the character of the neighborhood. In my view, this change in the neighborhood and the dangers it posed to the residents caused Rathborne to move.

Even if Garfinkel's acts constituted a constructive eviction, which I find they did not, Rathborne cannot complain of those acts because he did not vacate the premises within a reasonable time after the acts occurred. Most authorities hold that a tenant must abandon his premises within a month of the landlord's acts. 91 A.L.R.2d 638, 647. In Merritt v. Tague, 94 Mont. 595, 23 P.2d 340 (1933), a landlord harassed a tenant for two months, and the tenant vacated the premises three months later. The court held that the tenant could not recover. New York appears to hold that the tenant must abandon within two months. Waldene Realty Co. v. Pfalzer, 223 App.Div. 787, 227 N.Y.S. 649 (1928). In addition, a tenant cannot recover when the wrongful acts about which he complains have ceased. Goldberg v. Lloyd, 110 N.Y.S. 530 (1908).

Rathborne vacated in November, 1972. The Munchtime air conditioner was installed in 1966. The hostility between Garfinkel and Rathborne began about 1970. The electricity was restored in July, 1972. The buzzer never worked, and the lock was broken since June, 1972. Even

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assuming fault on the part of Garfinkel, Rathborne, in waiting as long as he did to vacate, cannot now argue that he was constructively evicted.

The evidence does not support Garfinkel's claim for $8,200.00, which he contends he paid to clean the apartment. Nevertheless, under the lease Rathborne is liable to Garfinkel for $500.00 for failing to give thirty days notice before he vacated. This may be set off against Rathborne's $500.00 deposit which Garfinkel kept.

This opinion shall constitute findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

A judgment in accordance with this opinion may be entered.

Dated this 24th day of April, 1975.

United States District Judge

PPI-Sandstone
8-28-69-600M-429

PRESCOTT RATHBORNE

was thereupon produced as a witness in his own behalf, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Please be seated. State your full name and spell your last name.

THE WITNESS: Prescott H. Rathborne. R-a-t-h-b-o-r-n-e.

THE CLERK: Prescott H. Rathborne.

EXAMINATION

BY THE COURT:

Q You live in New Orleans at the present time, don't you?

A Yes.

Q How long have you lived there?

A Since November of 1972, Your Honor.

Q Prior to that time, did you occupy the premises owned by the defendant?

A Yes, sir.

Q Did you move into Apartment No. 5 in January, 1966?

A Yes, sir.

Q And, Apartment No. 4, some five or six months later?

A Yes.

Q You made considerable improvements in the apartments?

A Yes.

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MR. JACOBS:

Q Mr. Rathborne, before you found the apartment at 200 East 53rd, how long had ----

THE COURT: How is that going to prove or disprove any issue in this case?

MR. JACOBS: To show what his intent was when he moved into the apartment.

MR. STEINBERG: Your Honor, I object to that question. It is not relevant to the inquiry.

THE COURT: Go ahead.

THE WITNESS: I had looked ----

THE COURT: Don't answer the question.

Q (By Mr. Jacobs) Mr. Rathborne, could you briefly state what improvements you made to the apartment?

A From the inner structure working as the building was reconstructed, October, November, December of '65 ----

MR. STEINBERG: Your Honor, just a minute. He is making a conclusionary statement when the building was constructed.

THE COURT: Didn't you have a list of those improvements?

MR. JACOBS: I submitted to Your Honor a report.

THE COURT: You don't have to put that in now.

Q (By Mr. Jacobs) Mr. Rathborne, was there an inner stairway from one floor of your apartment to the other floor?

A From the beginning, yes.

MR. STEINBERG: Your Honor, just a minute.

THE COURT: He is testifying. You will have an opportunity to cross-examine.

MR. STEINBERG: I object to the question, was there an inner stairway. He has to take the building in accordance with the situation of occupancy.

THE COURT: The objection is overruled. Let him continue his examination.

Q Did anyone else have access to the upper floor of your apartment?

A No, sir.

Q How did you get from the lower floor of the building to the first floor of your apartment?

A Through my doorway.

Q Could anyone get into either the third floor of the building or fourth floor without entering into that door?

A No, sir.

Q Was there a wall alongside ----

THE COURT: What is the purpose of this examination?

MR. JACOBS: To show, Your Honor, it was one apartment. I am not going to go into it very deeply, Your Honor.

THE COURT: You have got to show some authority to indicate he is not bound by the decision of the Rent Control Commission. Is that the purpose of this?

MR. JACOBS: Yes. It will take two minutes, Your Honor. I want to show one picture which Your Honor can look at. Does this depict the stairway going up from the first floor of your apartment to the second floor?

THE WITNESS: Right.

MR. JACOBS: I offer Exhibit 20 for identification.

THE COURT: Admitted provisionally.

(Plaintiff's Exhibit 20, Photograph, was received in evidence provisionally.)

Q (By Mr. Jacobs) Mr. Rathborne, prior to making improvements to your apartment and to the terrace, did you discuss that with the landlord and his attorney?

A Yes, sir. In 1965, I discussed at great length with both Mr. Garfinkel and Mr. Steinberg the idea of making these two floors a duplex apartment with a spiral staircase going to the roof of the floor.

MR. STEINBERG: I object to the word "duplex apartment" as a conclusionary statement.

THE COURT: Mr. Steinberg, will you please take your seat and keep still.

MR. STEINBERG: Okay.

THE WITNESS: Mr. Steinberg told me at this time -- I don't understand any of the legality -- that was the reason he never got a certificate of occupancy until the late days.

Q (By Mr. Jacobs) I ask you just to tell us what the conversation was. Did you talk to them about putting a garden into this building?

A Yes, sir.

Q What did you say to them?

A I wanted to put a greenhouse, a temporary greenhouse over on the floor as well as the one on the second floor.

THE COURT: How is this going to prove or disprove any issue in the case?

Q Was there any air-condition unit there when you moved in?

A Absolutely not.

Q Will you stipulate these were the leases, Exhibits 1 and 2?

(Exhibits handed to Mr. Steinberg.)

A This is okay.

THE COURT: The leases are admitted. They speak for themselves.

(Whereupon Plaintiff's Exhibits 1 and 2, Leases, were received in evidence.)

Q (By Mr. Jacobs) Mr. Rathborne, the terrace with the air-condition unit of Munchtire was ultimately placed on which roof?

A The adjoining roof on the two-story building that was parallel with my third floor.

THE COURT: It wasn't over your Apartment No. 4?

THE WITNESS: No, sir.

THE COURT: Was it over Apartment No. 5?

THE WITNESS: No, sir.

THE COURT: It was in the adjacent apartment?

THE WITNESS: Yes, sir.

Q (By Mr. Jacobs) It was over the space occupied by Park's Tours?

A Yes.

MR. JACOBS: Your Honor, I would point out to Your Honor Paragraph 35 which gives the plaintiff exclusive use of that roof.

THE COURT: All right. Go ahead.

Q (By Mr. Jacobs) Mr. Rathborne, do you recall when the

air-conditioning unit was installed with relation to when you moved in?

A About six -- about nine months after Munchtime moved in.

Q About how long after you moved in approximately?

A It may have been the second -- it may have been 1967, the winter of '67.

THE COURT: It was sometime after you moved in?

THE WITNESS: Very substantial time.

THE COURT: Go ahead.

Q (By Mr. Jacobs) Did anyone ask your permission to put that on the roof?

A No, sir.

Q When you discovered the air-conditioning unit on the roof, what did you do?

A I telephoned Mr. Steinberg usually and Mr. Garfinkel. I talked to the people that had installed it.

Q What did you tell Mr. Steinberg and Mr. Garfinkel?

A I told them I had exclusive use of the roof. He told me he didn't care.

Q Who told you?

A Both Mr. Steinberg and Mr. Garfinkel.

THE COURT: Did you have exclusive use of the roof over the adjacent tenant?

THE WITNESS: Yes, sir.

THE COURT: I thought it was over your own apartment.

THE WITNESS: I had two roofs, Your Honor, over Apartment 4 and over Apartment 5. Apartments 4 and 5 were over each other and above 5 was one roof. That's not the roof in question at this moment.

MR. JACOBS: We can show you that.

THE COURT: I would like to see it.

MR. JACOBS: I am having it marked right now.

THE COURT: Show it to me on the lease that you have.

THE WITNESS: This is Apartment 5, Your Honor. This is Apartment 4. And, this is the adjoining two-story building. This is the roof over Apartment 5 back here.

THE COURT: Where was the air conditioner installed?

THE WITNESS: These two things almost are in the center of this roof; there are two machines.

THE COURT: Did you lease this premise?

THE WITNESS: This whole roof which went back here.

THE COURT: Is yours?

THE WITNESS: Yes, sir, right to this box here.

THE COURT: Is there any dispute about that?

MR. STEINBERG: May I see the language of the lease before I commit myself to the Court? I don't want to see that self-serving picture.

THE COURT: Didn't you know about this contention a long time ago, Mr. Steinberg?

MR. STEINBERG: Oh, yes.

THE COURT: Why didn't you look at the lease before you came into court?

MR. STEINBERG: I just want to see one word. I did look at the lease, Judge. This is the one, that's right. Judge, this lease is mine, Paragraph 35. But I absolutely emphatically deny adding of the word improvement. I never wrote that. That's not my handwriting.

THE COURT: I get the point. Go ahead.

Q (By Mr. Jacobs) Mr. Rathborne, Exhibit 33 for identification is a fair rendition of the way your roof looked, this roof extension in approximately November of 1972?

A Yes, sir. It is an understatement.

MR. JACOBS: I offer this into evidence.

THE COURT: I am not admitting it for the purpose of showing all the foliage. I am admitting it for the purpose of showing the extension.

(Plaintiff's Exhibit 33,

Picture, was received in evidence.)

Q (By Mr. Jacobs) Now, Mr. Rathborne, with regard to these air-conditioning units there on the roof, did there come any time where people asked you for permission to go on your roof to repair these units?

A Yes, sir.

Q How many times?

A Well, over a hundred, sir.

Q Did you ever grant permission?

A Yes, sir.

Q Did there come a time when you complained about people going on the roof?

A Yes, sir.

Q Mr. Rathborne, I show you Exhibit 3 for identification and ask you if this is a letter you wrote to Mr. Steinberg about the air-conditioning units on the roof?

THE COURT: Haven't you shown that to your own witness yet?

THE WITNESS: Yes.

MR. JACOBS: Yes, Your Honor. I want to offer it into evidence.

THE COURT: Admitted.

(Plaintiff's Exhibit 3, Letter, received in evidence.)

MR. JACOBS: I also offer Exhibit 4 into evidence, Exhibit 5 and Exhibit 6.

THE COURT: Why don't you give me all the exhibits connected with that request.

MR. JACOBS: That's it, Your Honor.

(Whereupon Plaintiff's Exhibits 4, 5, and 6, Letters, were received in evidence.)

MR. STEINBERG: Aren't these letters self-serving? He said he sent them to Mr. Garfinkel and to me.

THE COURT: What difference would it make?

Q (By Mr. Jacobs) Mr. Rathborne, did there come any time when there was violence in connection with this roof condition?

A Yes.

MR. STEINBERG: Objection.

THE COURT: Objection overruled.

Q When was the first time?

A I don't know which was the first time, sir.

Q Approximately when?

A In mid-1972, around June of 1972.

Q What happened?

A Mr. Garfinkel ordered these very large men who were dressed in uniforms to shove me around, push me.

THE COURT: Did you see him do it?

THE WITNESS: Yes, I was there.

THE COURT: You heard him order them to do it?

THE WITNESS: Several times, Your Honor.

MR. STEINBERG: Your Honor, there is no allegation in the complaint about that. This is a surprise to me. There is nothing in any allegation of the complaint in this matter which alleges that we hired somebody to push him around.

THE COURT: He is claiming that you interfered with his peaceful possession. He can show it in various ways. The objection is overruled.

Q Were there any other incidents?

THE COURT: Wait a minute. I want to ask him some questions about that.

THE WITNESS: Yes, sir.

EXAMINATION

BY THE COURT:

Q What did Mr. Garfinkel tell those people?

A On the roof, Your Honor, when he was right there, he said, "I don't give a fuck what he says. Go do what I want. Shove him down, push him."

Q Why were these men on the roof?

A I believe harassment, Your Honor.

Q By whom were they employed?

A I really don't know, Your Honor.

Q Did you ask them?

A I probably did on some occasions.

Q They wore uniforms?

A Sometimes, yes.

Q Did they wear uniforms of electrical repair company?

A Sometimes it may have appeared that way.

Q In addition to their purpose of harassing you, did they also come for the purpose of fixing the air-conditioning unit?

A Hundreds of times in two years.

Q Did they work on the air-conditioning unit?

A Usually not, sir. Usually they came up there to talk.

Q To talk?

A Yes, sir.

Q Was Mr. Garfinkel on the roof at that time?

A No, sir.

Q Where did you hear him give the directions to those four men?

A I believe every one of these times, Your Honor, he was about four feet away on Mr. Ellenberg's sky exit, the fire exit.

Q Can you tell me with greater accuracy or specificity the date upon which he made that statement to you?

A There were several statements made several times. It

happened several times.

Q Tell me the first time, as you recall it. Was it in June, 1972?

A Vaguely, Your Honor, yes. This happened repeatedly.

Q Does that mean June, July and August of 1972?

A And September, October and in November, I would see Mr. Garfinkel on that little sky thing with people ascending them on the roof or in some other way tapping on the window, just being a regular nuisance.

Q When did you vacate the premises?

A The end of November, 1972.

Q In addition to that type of harassment, did he harass you in any other way?

A Yes, sir, many times.

Q Can you tell me how he harassed you?

A Well, in the judge's chambers in the courthouse prior to this.

Q What kind of case was that?

A This is when I was trying to reget my rent back.

Q What year was that?

A I believe it was in '72; maybe the end of '71, sir. I don't recall the date.

Q Your lawyer says it was in '71.

A Yes, sir.

MR. JACOBS: Your Honor, the court appearance is

February 1st of '72 that he's talking about.

Q (By the Court) What did Mr. Garfinkel tell you?

A Mr. Garfinkel told me he was going to take care of me. He said, "You remember when I mentioned to you Peter Dethmore was killed. You're playing with people you shouldn't mess with."

Q Did he threaten you in any other way at any other time?

A Yes, sir. This sort of threatening thing went on several other times.

Q Did you have the doors of one of your apartments broken into?

A It was battered, sir.

Q Who did that? Were you there?

A Yes, I was in my apartment. I did not see the man.

Q Was the door battered badly?

A There was steel on the inside that went through the wood, yes, sir.

Q At another time was there grease put on the door?

A About three other -- there were three times grease was put on; some of it was feces. Many months later, they put grease all over.

Q Were you having any other problems with other persons other than Mr. Garfinkel in that apartment?

A There were various people.

Q Who were they?

A Well, most of them I didn't know. Mr. Steirberg was more threatening than Mr. Garfinkel.

Q Mr. Steinberg is the lawyer?

A Yes, sir.

Q Does he live in the building?

A No, sir.

Q Does he have an office in the building?

A No, sir.

Q He threatened you also. But, was there any other person in the building who threatened you?

A Mr. Avolon also did.

Q What did Mr. Avolon tell you?

A He also made the comment about Mr. Dethmore.

Q Was there anyone else? What else did Mr. Avolon do?

A He was sometimes with these people that came to repair the air conditioner.

Q Will you tell us who Mr. Avolon is?

A He is the head of Munchtime.

Q He is the man who was the head of the organization that installed the air-conditioning unit?

A That's what I understand.

Q Was there anyone other than Mr. Avolon, Mr. Garfinkel and Mr. Steinberg who harassed you or threatened you in any way?

A Sir, I got -- I must have gotten thirty phone calls that

said, "You know what happens to people who don't give in to us."

Q Who were they?

A Sir, I don't know. I had people come to the door, I would see their faces and they would say, "I have a package for you. Come on out and get it." Other times they would say, "I have a gift for you. Come on out and get it."

Q Did you go out?

A No, sir.

Q How do you know it wasn't a gift for you?

A I said, "Show it to me." I mean, these people were dressed usually very nice. Another time, several times people said they are from the building department. I said, "Do you have a card or something? Do you have a badge?" They would just leave when I would ask for identification.

Q Mr. Rathborne, did you use these two apartments solely for the purpose of residence?

A Sir, I worked for myself. I received no money other than my own money that I received. I had no building. I did audio vision. I looked at pictures, mostly it was slides and some film.

Q For whom?

A For myself, sir.

Q In other words, you are the beneficiary of a trust or some funds that you use for the purpose of living expenses?

A For whatever I prefer.

Q You also are the head of an organization called Mind?

A Yes.

Q Will you tell me briefly what that is?

A Sir, it's a way to have better educational programs for children of all ages, races globally. Sesame Street was an idea that actually is about forty years old, thirty years old. And, what we are doing is the idea for making education far better for many more people.

Q How big is the organization?

A Well, before we called it Mind, we called it Prescott Rathborne Productions. We had Reno Debosa (phonetic) as an advisor to the thing. We had Buckner, we had Mr. Fuller. We had the president of the National Council of Churches. We had John McKell (phonetic).

Q Did you produce any films?

A We have done some experimental research, sir.

Q Do you have members that belong to the organization that fund it?

A No, sir.

Q How was it funded?
A I funded it, sir.
Q How long have you been working with that group?
A Since 1965 about; and, in 1970 is when we finished our research. And, we had planned to go forward.
Q Is this an organization that deals with extrasensory perception?
A Like, sir, fighter planes have sixty sensory systems on it. Your earth satellite, depending on how one defines it, has anywhere from ten to fifty.
Q Approximately how many people came into your office from time to time?
A Besides the people that worked with me, I would have a meeting about once a week, three or four people.
Q How many people worked for you in connection with that activity?
A Usually one at a time, two at a time; but not even solidly, sir.
Q Sometimes they did?
A Sometimes they did, sometimes they didn't, right.
Q You had domestic help?
A Yes.
Q Was that in addition to the other help?
A Except the last six months, I brought in -- because of what was going on, I had people in there all the time.

It was like chaos. It was a seige. There were people at the door. There were five or six or ten incidents a day.

Q You mentioned Sesame Street, you were not the producer of that?

A No.

Q You mentioned the name of John McKell. Is he in the book publishing or selling business?

A No, sir, educational material. He would be close to that, yes, sir. One of his last books was Future of the Future. He is up at the University of New York in Binghamton.

Q Are you contending the incidents stimulated by Mr. Garfinkel were so severe that it was necessary for you to see a psychiatrist?

A Sir, I was flipping out. I screamed.

Q Who decided that you should go see the psychiatrist?

A Bradley Davis; everybody. I mean, I was screaming at everybody. I was crying.

Q Had you ever seen a psychiatrist prior to that time?

A Yes, sir.

Q Over a period of what time had you been getting psychiatric help?

A I didn't get any psychiatric help. I did go earlier once in 1900 -- I think '70, twice in 1970.

Q You went twice in 1970. Was that the first time you had ever gone to a psychiatrist?
A No, that was the second time.
Q When was the first time?
A About '61 or '62, also about twice or three times.
Q Was that for nervousness?
A No, sir.
Q What was that for?
A I went when I was in the Army about twice. Then in 1970, I had a tax case and I went then.
Q You went to a psychiatrist because you had a tax case?
A Yes, sir.

MR. JACOBS: I think he should bring out, Your Honor, I was going to bring out the plaintiff was convicted in this courthouse of failure to file income tax returns. Your Honor can question him about that. I was going to bring that out.

Q (By the Court) What type of a discharge did you get from the military?
A Under honorable conditions.
Q You were dismissed because of health reasons?
A No, sir. Well, inability to adjust. I was in three years.
Q When you were convicted, did you spend any time in an institution?

A No, sir.
Q Were you given probation?
A On the tax case?
Q Yes.
A Yes, sir.
Q Were you ever asked by Mr. Garfinkel or Mr. Steinberg not to conduct any business activities in the apartment?
A I was ordered to.
Q What did you do? Did you continue to operate your business?
A No, when they came to me, they said they could -- since I could not operate a business, I don't know whether I was or not. I found out I was.

MR. STEINBERG: What was that last remark?

THE COURT: He found out he was operating a business.

THE WITNESS: They offered to rent me some extra space they had available.

Q (By the Court) What year was that?
A Sir, it was about 1970. I really don't know the date. We have that in the record.
Q Do I understand that prior to 1970, you experienced no difficulty with Mr. Garfinkel or anyone else in connection with the occupancy of that building?

A I am not saying that, sir.
Q I thought that's what your counsel said.
A No, what we are saying is -- I don't know what he is saying -- but I'm saying is I had difficulty; but in 1970, it was like being under seige in a fortress.
Q In 1970?
A Starting in 1970. And, by June or July, for instance, when they axed the door, they also turned off the electricity; and, they also locked me out. It was like -- I believe there was so many incidents which I think would be proper, I don't know anything about the law, whether it would be proper for you to hear.
Q Go ahead and tell me.
A If I could go in order here. Mr. Steinberg, in his office said to the lawyer, "You know what happens to people like this. I don't know what you're doing defending a client like this. I warn you. This is really silly of you."
Q He told that to Bradley Davis?
A He threatened Bradley Davis. Those are in substance the words. It was like some movie I was listening to.

MR. STEINBERG: It's a little hard to hear.

THE WITNESS: I will speak up. He also told me in his office -- in the courthouse, I think I mentioned

that. "You remember the conversation about Peter Dethmore." Peter Dethmore was a man that had fought these builders in a situation like this and had died. I don't know how the court records show he died.

Q Give me the next one. You have told me about those incidents before.

A Right.

MR. JACOBS: Your Honor, possibly I could question him.

THE COURT: Go ahead.

CONTINUED DIRECT EXAMINATION

BY MR. JACOBS:

Q Mr. Rathborne, could I just talk to you briefly about the service in the building and how it was in 1970, '71, '72. Could you tell me about the heating situation?

A Your Honor, on a cold day in winter when it was getting down to 15 or 20 degrees, if I hadn't had my own heat -- some of them were about eight-foot long electric heaters.

Q How many did you have?

A I think we had nine, like 2,500 watts I think is the word.

THE COURT: What about the other apartments in the building, were they equally without heat?

THE WITNESS: Sir, I don't know.

THE COURT: You don't know?

THE WITNESS: No.

Q (By Mr. Jacobs) With regard to the condition of the hallways and all, was there trash, rubbish, was it kept clean?

MR. RATHBORNE: Judge ----

MR. GARFINKEL: Max, sit down.

A It became somewhat of an obstacle course to get out of there, whether it would be urine which was frequently applied or whatnot.

Q Was that done just on your floor or on other floors?

A Sir, I don't know.

THE COURT: You mean to say you only looked at your own floor?

THE WITNESS: There were three entrances on my floor; one to below my roof; one to these people there and there was one on the apartment on the second floor.

THE COURT: Was their entrance clean and yours was dirty?

THE WITNESS: I am not implying that.

THE COURT: I don't know what you are testifying to. You mean to say you only saw the situation immediately in front of your own apartment?

THE WITNESS: In that entrance getting to the street from my apartment.

THE COURT: Was that a separate entrance?

THE WITNESS: The door was common.

THE COURT: Was that filled with trash and rubbish?

THE WITNESS: And other objects and people and urine and paint or garbage.

THE COURT: Were they people going to other apartments or people from the street?

THE WITNESS: From the street, Your Honor.

THE COURT: Did the neighborhood deteriorate materially from 1967 to 1972?

THE WITNESS: No, sir. In 1965 when I moved in, this was just a few years after there had been an L on Third Avenue, which was not a very attractive area. Since I moved in in 1965 and 1966, this became a street that was written up in articles. It had all these beautiful shops and restaurants and my garden. There was a plastic shop that was done in plastic.

THE COURT: What else do you want to ask him?

Q (By Mr. Jacobs) Are these pictures that were taken by you in front of your apartment door?

A Yes, sir.

MR. JACOBS: I offer them in evidence.

THE COURT: Who took the pictures?

THE WITNESS: I did.

MR. JACOBS: 27, 28, 29 and 30.

THE COURT: Have you seen those pictures?

MR. STEINBERG: I have not.

MR. JACOBS: Your Honor, it was all shown at his deposition.

MR. STEINBERG: I have not seen them.

MR. JACOBS: In regard to this business of surprise, Your Honor has read the depositions. Mr. Steinberg was available at those depositions and could have read them. This is not a surprise.

THE COURT: I asked you earlier to list all your exhibits and show them to opposing counsel.

MR. JACOBS: Your Honor, all of these exhibits were produced prior to trial and were available to counsel.

THE COURT: That's not what I said to you.

MR. JACOBS: I listed these.

THE COURT: Show them to counsel.

(Handed.)

Q (By Mr. Jacobs) Mr. Rathborne, are these photographs Exhibits 23 and 24, do they depict your door after the axing?

A Yes, sir, partially. It was worse than this because you could not cite it all.

MR. GARFINKEL: He did it himself, the garbage.

MR. STEINBERG: Your Honor, could we have a date this was taken?

THE COURT: Could you tell us what the day is?

THE WITNESS: It was about 1970, sir.

THE COURT: You don't know what day it was?

THE WITNESS: No, sir.

THE COURT: You didn't list the day?

THE WITNESS: No, sir.

THE COURT: He didn't put the day on it. Your door was axed?

THE WITNESS: My door was axed.

THE COURT: Go ahead.

MR. JACOBS: I am showing to counsel and I show to you Exhibit 31. Is this a picture of your door buzzer depicting the grease that was on the buzzer?

THE WITNESS: Yes.

Q (By Mr. Jacobs) Did you take that photograph?

A Yes, sir.

MR. STEINBERG: I don't want to see them.

THE COURT: Anything else?

MR. JACOBS: Yes, Your Honor.

THE COURT: Go ahead.

Q (By Mr. Jacobs) Mr. Rathborne, was there a door buzzer downstairs to be used to admit people to the building?

A Yes.

Q Was that provided for you in your lease?
A Yes.
Q Did that buzzer operate?
A Not since early like '67.
Q Mr. Rathborne, was there a lock on the front door, the door leading from the street into the building?
A Generally, not. That was changed continuously.
Q What would happen if somebody came to the building to see you?
A They couldn't. They would have to go to a public pay phone and call me because I would have to come all the way downstairs to the street to open the door if it was closed.

MR. GARFINKEL: He broke it.

MR. JACOBS: Your Honor, Mr. Garfinkel will have an opportunity to testify.

THE COURT: Yes. Go ahead.

Q (By Mr. Jacobs) Mr. Rathborne, did you have any problem with the roof above you?
A Yes, sir.
Q What problem?
A For the last three years, it was not tarred as these roofs are normally done every year; and, starting around June of 1972, in the middle of the night, four o'clock, five o'clock, three o'clock in the morning,

there would be people on the roof. Then there would be holes in it and the water would come in.

Q Did you have any problem with any roof leaks?

A Yes, sir.

Q Did you speak to Mr. Garfinkel about it?

A Yes, sir.

Q Did he repair it?

A No, sir.

Q Did you have it repaired?

A Yes, sir.

Q I show you Exhibit 16 for identification. Is this a bill that you received for repairs to your roof in 1972?

A Yes, sir.

MR. JACOBS: Also, Your Honor, that was made available a long time ago.

THE COURT: That is not the agreement. I told you I wanted each of those exhibits listed in advance of the trial. You keep telling me you didn't have the time to prepare.

MR. JACOBS: In this case, everything was listed.

THE COURT: Why didn't you show it to him beforehand?

MR. STEINBERG: Your Honor, I never saw this.

THE COURT: After this, hand the exhibits to the

Clerk.

Q (By Mr. Jacobs) Mr. Rathborne, when the apartment needed painting, did you speak to Mr. Garfinkel about that?

A Yes, sir.

Q What did he say to you?

A He offered to send up his drunken friends as he done once before.

Q Did you pay for the painting of the apartment?

A Yes, sir.

Q Mr. Rathborne, did there come a time when you had a conversation with Mr. Garfinkel about your moving from the apartment?

A Yes.

Q When approximately, if you can recall was that?

A I believe that was in the summer of '71.

Q And, what did -- where did this take place?

A In Mr. Garfinkel's store. He had called.

Q Mr. Garfinkel's store was right in the same complex?

A Right, sir.

Q What did Mr. Garfinkel say to you and what did you say to him on this occasion?

A Mr. Garfinkel asked me if I would be cooperative, if I would be willing to move out, I believe were his questions, would I be agreeable.

Q What did you say?
A I said, "Yes, sir."
Q Is that the only conversation you ever had with Mr. Garfinkel about moving out?
A No, sir -- it was the only conversation; but this wasn't the only comment about moving out.

THE COURT: Tell me what other comments you had. Did you offer to move out for money or did he offer you any money at this first conversation?

THE WITNESS: Neither.

THE COURT: Did you ask him for money?

THE WITNESS: No, sir, never.

THE COURT: He never offered you any money?

THE WITNESS: No, sir, never.

THE COURT: I thought in your statement you mentioned he said he would make it worthwhile if you would move out.

THE WITNESS: I never heard that; I never said that.

THE COURT: All right. I must have been mistaken.

Q (By Mr. Jacobs) Did you ever have a conversation with Mr. Garfinkel about the fact a developer was assembling the block?
A Yes, sir.
Q When, if you recall, was that?

A That would be about 1970, vaguely.
Q Where did that take place?
A Well, directly, it had to do with ----
Q Where did it take place?
A In his office in his store.
Q What did he say to you on that occasion and what did you say to him?
A It's quite hazy about the exact words.
Q Tell us the substance.
A Mr. Garfinkel told me that Mr. Glickman was assembling the block, that he was going to make -- he would not sell for two million dollars. I was the only statutory tenant in the entire complex that he had a lease on and that if I knew what was good for me -- then he went in and told me about the guns used in the area and about Arnold Benedict being held up when Arnold Benedict wouldn't move three stores away and that I had better cooperate. This wasn't the only time he made it very clear.

THE COURT: What other time did he do it?

THE WITNESS: In the courtroom, Your Honor. Not in the courtroom, in the court hallways.

THE COURT: Were you alone or who else was there?

THE WITNESS: No, that day there was at least

Mr. Davis, Miss Allen and I believe there may have been somebody else, I don't recall, and Mr. Garfinkel.

Q What did he say?

A I don't know if all these people were present that moment. They were all in the building there. We are talking about Mr. Garfinkel?

THE COURT: Yes.

THE WITNESS: Mr. Garfinkel said, "You better watch out. You're going to get it. You heard me before. I warned you, you know what happens to people like you. You're going to get it." He sort of pointed his finger and started shoving.

THE COURT: Did you report that to the police or marshal or sheriff?

THE WITNESS: Not there. I did go to the police several times and they would say, "Get lost" or something like that.

THE COURT: But were there court attaches in the area?

THE WITNESS: I don't know, sir.

THE COURT: Go ahead.

Q (By Mr. Jacobs) Did you ever have any conversations in your own apartment where Mr. Garfinkel made these threats to you?

A On my terrace he did several times. We went in to some

of those. He threatened me on the stairs about moving again.

Q Let's now talk about the incident after the axing and you were on the stairway and Mr. Garfinkel came upstairs. What did Mr. Garfinkel say to you after this axing incident?

A Mr. Garfinkel was almost frothing. He was just mumbling.

Q What did he say?

A He began to repeat, "I warned you. I told you about moving. You're going to get it. You know what happens to people like you. We're going to take care of you."

THE COURT: Did he accuse you of axing your own door?

THE WITNESS: He may have at one time, Your Honor.

THE COURT: On that occasion when he came up and was very upset and warning you, did he then say to you that you were responsible for the axing of your own door?

THE WITNESS: I don't think he did.

Q Did he say anything else?

A In substance, he said something about moving. He said, "What's going to happen to you and your furniture and your property ..." or something in this substance "... is nothing like what happened to that door."

THE COURT: I have read all this in his depositions. The same questions were asked him time and again. So I know what is there.

Q (By Mr. Jacobs) Mr. Rathborne, after the axing incident, did you go out and buy something for your own protection?

A Yes.

Q What did you buy?

A I bought a Doberman pinscher that was trained to do good things.

Q Did you use that Doberman pinscher subsequently?

A Only once when a man ----

Q I mean, did you take him with you when you went places?

A Yes, sir, almost everywhere I went.

THE COURT: Were you harassed after that?

THE WITNESS: The night he arrived, sir, is when they put the grease on my door, once during the middle of the night and once during that day.

THE COURT: After that, what happened in the building itself, were you protected by the dog?

THE WITNESS: It helped. It didn't stop. The objects thrown at me when I was on the terrace, some of them and bullets only this big and some of the objects were this big. (indicating)

THE COURT: Who threw them at you?

THE WITNESS: Sir, I don't know.

THE COURT: Were they thrown from the rooftops?

THE WITNESS: Various rooftops.

THE COURT: Were you attacked or harassed any place other than at the apartment when you were walking down the street with your dog or alone?

THE WITNESS: Yes, sir, I can think of two right now. One, we were coming out of my apartment and my dog lets out an enormous growl before we get out of the front door. I knew something was happening. So, I was very careful. I put him out first. We caught this man with a long knife like this which we have photographs of. (indicating) I went with a camera and a dog.

THE COURT: What did you do with the man you caught? Did you turn him over to the police?

THE WITNESS: Yes, sir.

THE COURT: Who was the man?

THE WITNESS: We have some records on that, sir.

THE COURT: Was he convicted?

THE WITNESS: Yes, sir.

THE COURT: Was he working for Mr. Garfinkel?

THE WITNESS: I don't know that, sir.

MR. JACOBS: We don't contend he was working for Mr. Garfinkel.

THE COURT: All right. Are any of these people

who you assert attacked or harassed you in the employ or were they in the employ of Mr. Garfinkel?

THE WITNESS: I don't have proof. However, there used to be a meeting place on Third Avenue that Mr. Garfinkel, Mr. Steinberg and Mr. Alex and a lot of other people would get together.

Q (By Mr. Jacobs) By Mr. Alex, you mean Mr. Avolon?

A Yes, Mr. Avolon. It was like a street congregation. When I would walk by there would be comments that he would say, "That's him" and that sort of thing. I felt as if these people -- but, I have no proof, sir.

THE COURT: Is 873 Third Avenue the next block from 200 East 53rd?

THE WITNESS: Yes.

THE COURT: Is that building still up or was it torn down?

THE WITNESS: I believe it is still up, sir.

THE COURT: The proposed improvements or new building didn't come about?

THE WITNESS: No, sir.

THE COURT: Go ahead.

MR. JACOBS: Thank you, Your Honor.

Q (By Mr. Jacobs) Mr. Rathborne, did you request Mr. Garfinkel to repair that door that was axed?

A Yes.

Q Was it repaired?

A Never.

Q Is this a letter you wrote to him asking him for the repairs?

(Exhibit handed to witness.)

A Yes.

THE COURT: Do you want to have all your other exhibits admitted?

MR. JACOBS: Yes, Your Honor.

THE COURT: All of them were identified in the depositions, weren't they?

MR. JACOBS: Yes, they are.

THE COURT: They are admitted provisionally.

(Whereupon all exhibits received in evidence provisionally.)

Q (By Mr. Jacobs) Mr. Rathborne ----

MR. STEINBERG: Your Honor, may I make this statement to you, please?

THE COURT: Yes.

MR. STEINBERG: When it comes my turn to examine all these documents, I can state to you now, I have not seen many of them.

THE COURT: Take a look at them now.

MR. JACOBS: Your Honor, I don't want ----

MR. GARFINKEL: I want to tell the Judge one word.

Can I get one word in, sir, please? Just two, three months ago, did you say, "Do you still love me Sol?" Did you come into my store and say, "Do you still love me?" just two or three months ago? He just come in and say, "I love you Garfinkel." He was in my store. I can't believe this.

THE COURT: Let's stop this. Go ahead.

Q (By Mr. Jacobs) Was there a lock on the door leading from your top floor to the roof above your top floor?

A Right there from my fourth floor to my fourth floor roof.

Q Did you put a bolt on that door?

A I put a bolt on that one also. I think you're referring to the bolt on it where the terrace was.

Q I'm talking about from the hallway out to the roof, not from your apartment.

A The terrace roof?

Q Yes.

A I put a two-by-four, two-by-six on it.

Q For what purpose?

A To keep people off. And, this was done at the direction of the Fire Department.

Q Was this agreed to early in your tenancy?

A Yes, sir.

Q Did there come a time in 1972 when you were informed

this was a violation, the use of this bolt, by the Fire Department?

A 1972 they had it changed over or so they claimed.

Q And, did you appear in court on that? I believe I went into all of these things.

THE COURT: What is the point?

MR. JACOBS: The point is, Your Honor, I will attempt to show through Mr. Davis, we submit the business with regard to this was instituted by the landlord to have a violation put on the door.

THE COURT: Go ahead.

Q (By Mr. Jacobs) Now, Mr. Rathborne, during the period your electricity was off, aside from what I have submitted to the Court, did you ever go to Mr. Garfinkel personally and ask him for access to the basement?

A Yes.

Q Did you ever go there with employees of Con Edison?

A Yes, sir.

Q What did he say?

A He said, "Get the fuck out of here."

Q Now, did you ever speak to Mr. Steinberg about obtaining access to the basement to find out what was wrong with the electricity?

A I called him. He said, "Get lost" or something to that effect. You ask them the same sort of questions, they

give you the same sort of answers. When we brought these men into Mr. Garfinkel's store, I said, "Well, the men are here to fix it." He said he doesn't care.

THE COURT: Fix the electricity?

THE WITNESS: My electricity, sir.

Q (By Mr. Jacobs) Mr. Rathborne, by October, 1972, could you tell us what the effect of what you have testified to so far today had on you?

THE COURT: It made him a nervous wreck. He has already testified to that. I have read the statement of the psychiatrist. He was screaming.

Q Did you decide, Mr. Rathborne, to move to New Orleans?

A Yes, sir.

Q For what reason did you decide to leave your apartment?

THE COURT: He left the apartment because he couldn't stand it any more. That's why he went to New Orleans. The doctor testified when he saw him the last time he feels much better.

Q Mr. Rathborne, is this Exhibit 32 a photograph of you?

(Exhibit handed to witness.)

A Yes, sir.

Q When was this taken approximately?

A I would guess around October of 1972.

Q Mr. Rathborne, could you estimate for me how much money you spent improving this apartment?

A How much I spent?

THE COURT: Yes.

THE WITNESS: That's not including my work or anything else?

Q How much money out of pocket you spent approximately?

A Well -- (pause)

THE COURT: Is it over $10,000?

THE WITNESS: Oh, yes, sir.

THE COURT: Over $100,000?

THE WITNESS: No, I am -- I don't think it would be.

Q (By Mr. Jacobs) Approximately 50,000?

A More than that, more than fifty.

Q In addition to monies you spent, Mr. Rathborne, could you tell us with regard to this roof garden, how much time you spent working on it?

A Just to replace what I had, not what I spent would be ----

Q How much time did you spend?

A Thousands of hours.

Q Mr. Rathborne, other than for the acts that happened to you in this case, would you have left that apartment?

A Yes, it was an incredible apartment; I would not have left for the rest of my life. I would have kept it.

MR. JACOBS: Thank you.

unit?

A I believe something to that effect, yes, sir.

Q What happened to that action?

A I don't know, sir.

THE COURT: Did you try the case?

THE WITNESS: I don't know, sir.

THE COURT: Was the case tried?

MR. STEINBERG: No, sir, it was discontinued.

THE COURT: Ask him the next question.

Q (By Mr. Steinberg) When you moved into the subject apartment, Apartment 4, what was the relationship between you and the landlord for the following year, let's say from '65 to '66?

A Not very good.

MR. JACOBS: He moved in in January, '66.

Q (By Mr. Steinberg) From '66 to '67, what was your relationship with him?

A Not very good.

Q Did you enter into a lease for Apartment 5 with it not being very good?

A I believe I entered into Apartment 5 first, Mr. Steinberg.

Q Let's reverse the question. You entered into a lease for Apartment 5 at premises 200 East 53rd for the year 1966 to '67. You said your relationship with the

landlord was not too good; is that correct?

A After he ----

Q Is that correct?

A From June or July of 1966, I think the documents speak for themselves.

THE COURT: Why don't you go to something else, Mr. Steinberg. I have read the depositions. I know how difficult it was to get Mr. Rathborne to answer a question directly.

MR. STEINBERG: Thank you.

THE COURT: Ask him about the issues involved.

Q (By Mr. Steinberg) Mr. Rathborne, you keep accurate records, do you not, of events that transpire?

A I do not.

Q You have a stenographer that you retained at 200 East 53rd Street; is that correct?

A That's not correct.

Q How many people did you have in your employ from the period 1969 to 1972?

THE COURT: At one time?

MR. STEINBERG: At one time.

THE WITNESS: Well -- (pause)

THE COURT: Did you have as many as five?

THE WITNESS: Something like that, sir.

THE COURT: Over a period of that time,

ETHEL NICHOLAS

was thereupon produced as a witness in behalf of the plaintiff, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Please be seated. State your name and spell your last name.

THE WITNESS: Ethel Nicholas, N-i-c-h-o-l-a-s.

EXAMINATION

BY THE COURT:

Q You worked for Mr. Rathborne from 1967 to 1972?

A Yes.

Q What kind of work did you do for him?

A Domestic.

Q Did you work for him four days a week more or less?

A Four days lately, four days the last four years.

Q Did you do any other work for Mr. Rathborne during that period?

A I was like, all around, general, running errands and things.

Q Did you work for him in connection with the business activity?

A No.

Q You just ran errands for him and cleaned the house?

A Yes.
Q Do you remember the work that he did, fixing up the terrace and other places?
A The first two years he and I got the apartment in order.
Q He put in a lot of time and money in it?
A Yes.
Q When was the air-conditioning unit installed?
A I don't remember when it was installed; but I saw it there; like it was overnight. I wasn't there when it was installed.
Q It was put in overnight?
A When I discovered it, it was all there.
Q Was it working?
A It was -- first there were men coming up after I saw it; they were working on it. Then, to my knowledge, when I discovered that it was there, they started coming out; and, it was the first couple of years they would come up, I would open the door, they said, "The air conditioner was out of order." They had to fix it.
Q Did they fix it?
A Yes.
Q Did it make a lot of noise?
A Yes.

Q It made a lot of noise?
A Yes.
Q Did Mr. Pathborne object to the noise?
A Yes.
Q Did the man come up more often in the latter part of 1970, '71 and '72?
A Every time it went out of order, sir, they would come up.
Q Did you or anyone else working for Mr. Rathborne do anything to make it go out of order?
A No.
Q They never came up there unless it was out of order?
A No, sir, not at the time that I was there.
Q Were the hallways clean?
A Well, the hallways were like clean occasionally.
Q Who was supposed to clean the hall?
A Mr. Garfinkel said he had someone to take care of the hall.
Q How many tenants were there for the halls in your unit?
A In my unit?
Q Yes.
A Nobody but Mr. Rathborne.
Q Did you have separate entrances?
A We had a separate entrance.
Q Was Mr. Garfinkel supposed to clean up your entrance?

A No, there was like a little vestibule about this square on the side; there was a little business or some sort of printery or something. Then on that was like on your right as you come up; on the left was Mr. Rathborne's apartment that led up from the door to come up to his apartment.

Q Was that dirty often?

A Quite often.

Q Did you ever see anybody throw any garbage there?

A It was like people had lunch up there, coffee cups.

Q You mean the people who ran the printing shop next door?

A I don't know.

Q You do know it looked as if some of the people had lunch there?

A Yes, they were using it.

Q What did you do when that happened?

A I would clean it up. In fact, sometimes Mr. Rathborne had presentations, I would clean it up, he asked me to.

Q Mr. Rathborne would have presentations?

A Yes.

Q When he had presentations, you wanted the hallway to look nice, so you would clean it up?

A Yes.

Q Was there some grease on the door in 1972 or thereabout?

A Yes, sir.

Q Who put that grease there?

A I don't know. But at 9:00 in the morning, Mr. Rathborne called me.

Q Where were you?

A I was home. I don't go so early.

Q He was upset and he called you?

A To come clean it.

Q Was Mr. Rathborne upset quite a bit of that time during the years 1967 and '68 about the way he was being treated?

A He was -- he showed emotion sometimes. He never spoke to me about, you know, his condition.

Q He was an emotional man?

A Well, if things sort of get out of hand, you know, harassment or something like that.

Q Was he often harassed?

A Sometimes.

Q By who?

A People would be in the hallway.

Q Did anybody else get harassed like some of the people who came to his apartment in connection with his business?

A I don't know.
Q It was only people who were connected with the building?
A People connected with the building, I really couldn't say that either.
Q Did Mr. Garfinkel ever threaten you?
A No, sir.
Q Did you ever hear Mr. Garfinkel threaten anyone other than Mr. Rathborne?
A No, sir.
Q Did you ever personally hear Mr. Garfinkel threaten Mr. Rathborne?
A There were hot arguments at times.
Q There were hot arguments?
A Yes.
Q What would they argue about?
A Mr. Garfinkel would come up and Mr. Rathborne would say, "I have nothing to talk about." Mr. Garfinkel would say, "Yeah, you've got to talk, you know. I want you out."
Q He wanted him out of the building?
A The building.
Q Did he say why he wanted him out of the building?
A I don't know.
Q Were you ever in Mr. Garfinkel's liquor store?

A Not at that incident.
Q Did you see Mr. Garfinkel overlooking the terrace?
A Several times.
Q Where was he standing?
A He would like walk around. From the window upstairs, I could look down on the terrace because it was even with Apartment 4.
Q He could do the same thing?
A He couldn't see me. I saw him from the window like, you know, a peeping tom.
Q Was Mr. Garfinkel also a peeping tom?
A I don't know whether he was a peeping tom. I was saying I was upstairs in the apartment looking down on the roof.
Q Where was he on the roof?
A On the terrace.
Q He was on the terrace?
A Yes.
Q Did you see other people on that terrace too?
A Some evenings late.
Q How many times?
A Five or six times or so.
Q Who were they?
A Strangers. I never saw them before.
Q Did you ask them who they were?

A No, sir.
Q Was Mr. Garfinkel there with them?
A No, sir.
Q Did you ever find people coming and knocking at the door?
A Yes, sir.
Q How many times?
A Many many times.
Q Who were they?
A I don't know, sir. I never opened the door. I was alone in the evening when these things would occur.
Q What time did you go home?
A Nine, ten, all depended on my work because down at Apartment 4, I had to clean that late in the evening like after five or six when everybody would, you know, the typist would finish, I would then clean.
Q Did people come there during the day and knock on the door?
A Some evenings.
Q Usually it was in the evening?
A I had no access other than when I'm there alone; I had no access when everybody else during the day was there with other people that answered the door.
Q What day was it that the electricity went off?
A '72.

Q For how long was it off?
A It was over a month or two months.
Q All the electricity in the two apartments was off?
A All.
Q Every place in the building?
A In Mr. Rathborne's quarters.
Q How about that printing shop downstairs?
A I don't know about that.
Q Did you see the electric people from Con Edison come there?
A Yes.
Q Did they fix it?
A They would go fix it, they say. The lights came on for about 15 minutes or so, and after they claimed they fixed it, they would leave. When they left, the lights stayed on about five or ten minutes and then the lights went off again and stayed off.
Q Did you see anybody come over there for the purpose of cutting the wires or doing anything like that?
A There were people on the roof around the electric wires and so on. I really don't know what the purpose was.
Q Were they from Consolidated Edison?
A They said.
Q What do you do now?
A I work domestic work.

Q Not for Mr. Rathborne?
A No.
Q Did you ever work for Mr. Garfinkel?
A No, sir.
Q Were you unfriendly with Mr. Garfinkel?
A No, sir.
Q Is he still your friend?
A We had -- like I was a customer. I go in there, that's it.

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MR. JACOBS:

Q Your Honor has done a fine job. I do have one or two things.

Mrs. Nicholas, can you tell us your best recollection how long Mr. Rathborne was living in the apartment? How long had you been working there before you first saw the air-conditioning unit outside on the roof terrace?

A When I realized this unit was up there, it must have been about three or four years, something like that. I only really got to noticing it when it started going out of order. That was like in two years, like '67.

THE COURT: What else?

Q Was the axed door repaired?

A No, sir.

Q Did you notice the change in Mr. Rathborne during the last six months he lived there?

MR. STEINBERG: Your Honor, she is not qualified to pass judgment.

THE COURT: She can testify as a lay person.

THE WITNESS: Yes.

Q What did you notice? What happened?

A 1972 he was like this, you know. (indicating)

Q What do you mean like this?

A He was drawn and looking pale and sick. He was losing weight.

Q How was the business getting along?

A The business was doing all right. He had people that was really efficient with his business.

THE COURT: Okay. That's all.

MR. JACOBS: Just a few more.

THE COURT: What else do you want to ask her? I covered everything that was in your statement.

MR. JACOBS: I just would like to, you know, cover a couple more things.

THE COURT: Go ahead.

Q (By Mr. Jacobs) Would you show Mrs. Nicholas 27 through 30 and ask her if she ever seen that scene outside Mr. Rathborne's door?

A No. He said, "I don't want it."

THE COURT: Was that after Mr. Garfinkel had filed an action to get Mr. Rathborne out of the apartment?

A I don't know about the filing of the action.

Q Do you recall when Mr. Rathborne was leaving the apartment in November of 1972 how long before that had you tried to give Mr. Garfinkel the rent and he refused to take it?

A '71 into '72, about four times, about four times, yes.

Q Last, when you told us about several times there was heated arguments between Mr. Garfinkel and Mr. Rathborne, can you tell us, if you can recall, any of the words that Mr. Garfinkel used?

A Any of the words were, as I could hear, from the upper floor where I was, he said -- they started talking low and then the next thing, there was a heated argument and Mr. Garfinkel would say, "I want you out. You got to go. You're going to get out of here. I'm going to see that you get out of here. You got to go."

MR. JACOBS: No further questions.

THE WITNESS: "Get out. I want you out."

CROSS-EXAMINATION

BY MR. STEINBERG:

Q What did Mr. Prescott Rathborne say to Mr. Garfinkel

that would lead him to make the statements, "I want you out"?

A From Apartment 5 that I was in, I could not hear if they are talking low except when they get to a high pitch.

Q Did Mr. Rathborne say any words in a loud pitch?

A I didn't hear it. All I heard was when Mr. Garfinkel said that.

Q If Mr. Rathborne was speaking in a loud pitch, you say you did not hear him?

THE COURT: First find out whether Mr. Rathborne was talking loud.

A They were talking. But I didn't hear what is going on from there.

THE COURT: Let Mr. Garfinkel testify to that.

Q (By Mr. Steinberg) Mrs. Nicholas, there were times you went to visit Mr. Garfinkel at the liquor store. Did you buy liquor or was it a social call?

A I bought liquor.

Q Did you speak to him in a friendly term?

A Yes.

Q At any time during your visit, did you ever tell him Mr. Rathborne was crazy?

A No.

Q At any time you visited him, did you tell him

A In the beginning I was doing a lot of reading to acquaint myself with what was being done in the field of television work and other educational concepts that were like this, just reading about it.

Q Did you get paid for reading?

A Yes, I kept a record of the time I spent and made up a bill at the end of September.

Q You didn't get paid prior to that time?

A No, except for expenses, books and things like that.

Q Did you go down with Mr. Rathborne when he was in court one day?

A Yes.

Q Whose court was that?

A Judge Wahl.

Q Was there an argument between Mr. Garfinkel and Mr. Rathborne?

A I don't remember a specific argument. I remember in the charbers there was something. It was either a situation itself or something that got said that annoyed Mr. Garfinkel. He said to the effect, "I am going to get this guy. I'm going to get him."

Q What did the judge say?

A I don't remember what the judge said. I remember Mr. Garfinkel's lawyer was trying to calm him down.

Q What was the subject matter of the discussion?

A It's a little hazy on that. From what I recall, Prescott was contesting the fact Mr. Garfinkel had intimidated him into renting another space which he felt he shouldn't have had to rent, an office down on the third floor, I guess it was.

Q So, he wanted to give that space up?

A Yes.

Q Mr. Garfinkel said he couldn't give up the space; is that what the argument was about?

A I don't remember all the particulars.

Q Were you in Mr. Rathborne's apartment when somebody was breaking down the door or attempting to break down the door?

A Yes.

Q Did you see who did it?

A No, sir.

Q Then, did you see Mr. Garfinkel come in thereafter?

A He didn't come in the apartment. I saw him on the stairs. He was very angry.

Q He was angry at whom?

A At Mr. Rathborne.

Q Why was he angry at Mr. Rathborne?

A It was like one thing more that was happening at this time.

Q Did he accuse Mr. Rathborne of trying to break down the

door?

A I am not sure whether he actually accused him. I just remember him being angry and shaking his finger at him saying something to the effect, "This is enough, well, you know, this is only the beginning if you don't cooperate with these people."

Q Cooperate with what people?

A I think it was the people that had the air conditioner on the terrace.

Q Mr. Rathborne was objecting to people coming up to fix the air conditioner?

A He was objecting to them coming on the roof without his knowledge and sneaking up there using the back, some other fire escape.

Q And did Mr. Rathborne have any dogs at that time?

A I am not sure of the exact date when he got the dog. I think he got the dog after the electricity went out like late in July. He just was very afraid.

Q Who was he afraid of? Was Mr. Garfinkel afraid of the dog? What kind of dog was it?

A It was a Doberman pinscher.

Q Was it a pretty big dog?

A Yes.

Q Was the door ever repaired?

A No.

who yells. I just don't like, you know, arguments.

Q Was Mr. Rathborne high-strung? Did he ever shout or yell or was he cool, calm and collected all the time?

A He wasn't cool, calm and collected all the time, no.

Q What happened?

A I think he felt sort of trapped by the whole situation and, it made him very paranoid. His tempers were short. When things would happen, he might blow up. I could understand why.

Q In his action towards other people or towards Mr. Garfinkel?

A I never saw him blow up at Mr. Garfinkel.

Q He never blew up at him?

A That time after the door axing, he wasn't saying anything. He was just saying that Mr. Garfinkel was yelling.

Q Did someone from Con Edison come there to fix the electricity?

A Two men came one day from the emergency squad or the trouble-shooting squad.

MR. JACOBS: I have an exhibit which Your Honor may want to use. (Handed to the Court.)

THE WITNESS: Prescott asked me to come down with him. I had a pad of paper. The dog came with us. And, we walked over to the liquor store where

Mr. Garfinkel was, and Prescott asked him for the key or to be allowed admittance into the basement where the electricity was. He wouldn't do it.

Q He wouldn't do it?

A No.

Q Did you write this note out?

A Yes, I did.

Q Those were the agents and they signed it, Donahue and Douglas. Is there anything else you want to tell us?

A Well, just it was a very -- that month was a very difficult time. It was a difficult time for us to do anything.

Q How many were there?

A There was myself, a girl who worked sort of as a full-time secretary was handling a lot of personal business matters for Mr. Rathborne. There was one or two typists who came in.

Q What did they type?

A It was a report that Mr. Rathborne was getting together. When I first met him, he was with people from Nesco, I believe it was, trying to get a more detailed report. And, they were either typing things associated with that which was Mind or in many instances, they were typing up legal documents and reports that involved this whole harassment.

saw him last week.

Q When he talked about the case?

A Yes.

THE COURT: Mr. Jacobs, anything further?

MR. JACOBS: Very little, Your Honor.

DIRECT EXAMINATION

BY MR. JACOBS:

Q Miss Allen, do you recall at the time of the axing incident where you saw Mr. Garfinkel and Mr. Rathborne in the hall, first of all, you were looking through a peephole in the door. Did you see Mr. Garfinkel point to the door?

A Yes.

MR. STEINBERG: Your Honor, this is a leading question.

THE COURT: It's all right. He asked if you saw him pointing to the door?

Q (By Mr. Jacobs) Did he point to the door? Did he say anything?

A He said something to the effect this is nothing compared to what can happen if you don't cooperate.

Q Miss Allen, you met the plaintiff, Mr. Rathborne in January of 1972?

A Uh-huh.

Q Did you see him up until November, 1972?

Did you see him in October, November?

A Not really.

Q You saw him in September of '72?

A Yes.

Q Did you note any changes in him in the way he acted between January of '72 when you first met him and September?

A He lost weight. He became more and more nervous and paranoid. I noticed the change.

THE COURT: You used the word paranoid a number of times. What do you mean by paranoid?

THE WITNESS: Well, there were a lot of things going on in the block at the time. We knew buildings were being bought by a company. We had read an article that other people had been harassed out of their apartments. We saw it.

THE COURT: Out of Mr. Garfinkel's apartment?

THE WITNESS: No, other apartments on the block. So, it was sort of a situation that we knew was around us. And, I think from what he knew of that and what was happening to him, he just became very fearful. The door axing, the electricity being turned off, he couldn't get it turned on except through a court order, he just didn't know what to expect next.

THE COURT: Is that what you refer to as paranoid?

A Fear of someone else.

THE COURT: It is an unfounded fear or a founded fear?

THE WITNESS: I felt it was founded.

THE COURT: Then he wouldn't be paranoid, would he?

THE WITNESS: Well, maybe I'm using the wrong word.

MR. JACOBS: I hope we will have the psychiatrist to clear this up.

THE COURT: All right.

Q (By Mr. Jacobs) Miss Allen, you say you spent almost every day in the apartment in the summer of 1972?

A Uh-huh.

Q Did you become fearful in the apartment?

A Somewhat, yes.

Q Would you have remained living in that apartment?

MR. STEINBERG: Well, Your Honor, I object to this as speculative.

THE COURT: Did you live in the apartment?

THE WITNESS: No.

Q (By Mr. Jacobs) If that was your apartment, would you have remained in it?

MR. STEINBERG: I object to that.

THE COURT: That's leading.

Q How about the floor below on the street floor?
A That's where it was collected; that's where all the tenants in the building left it.
Q Did you recall the time that a man kept beating on the door or breaking the door?
A Yes, I recall the police at that time.
Q Did you find out who did it?
A Well, what happened was -- I heard the door was opened because it was very hot, to get some ventilation. I had a window open, a door outside open. I heard all this commotion. I went out and saw a man with a pole about six feet long with a metal hook on the end of it battering at Prescott's door. I got very scared and immediately shut my door and hooked it and looked through the peephole and really only saw him from the back.
Q Did he continue to do that?
A He continued for about a minute to beat on the door; and, while he was doing that, I went and called the police.
Q Did the police come?
A Quite some time later, about three-quarters of an hour later.
Q The man had already left?
A Yes.

Q Did you ever find out who he was?
A At that time the police asked me to come downstairs; they had a group of men lined up in front of me. I did not recognize anyone at that time.
Q Who were these people?
A I believe that some of them were people who were employed in the restaurant downstairs, Munchtime; I don't know who the rest of them were.
Q Were they narcotics users or people like that or employees from the building or who?
A I didn't recognize any of them; I don't know who they were.
Q Did Mr. Garfinkel come shortly thereafter?
A Yes. Before the police arrived, Mr. Garfinkel did come up. At that time I was outside talking to Prescott; and, Mr. Garfinkel came up and saw the damage on the door; then he was on his way down again. What was your question? I'm sorry.
Q That was the question. Did you see Mr. Garfinkel?
A Yes.
Q What did Mr. Garfinkel tell Mr. Rathborne, if anything?
A Well, he was very upset, naturally, that his property had been damaged. And, I was trying to tell him I had called the police. He really was not interested in talking to me so much. I think he was annoyed I had

A I really don't know the name of the company.
Q It was a real estate company?
A Yes.
Q He wasn't prejudiced against all real estate people, was he?
A Well, we had no difficulty with each other.
Q That was a facetious remark.
A I thought so.

THE COURT: Go ahead, Mr. Jacobs.

MR. JACOBS: Yes.

DIRECT EXAMINATION

BY MR. JACOBS:

Q Mrs. Pafenyk at first, how long were your lights off?
A At least a week. I can't recall specifically how long.
Q But, it was not for a month?
A I don't think it was that long.
Q You didn't have to go out and get somebody yourself to fix it; it was fixed by Mr. Garfinkel?
A Yes.
Q Now, with regard to the conversation between Mr. Garfinkel and Mr. Rathborne on the stairway on June 27th, please tell us what Mr. Garfinkel said to Mr. Rathborne.
A My memory at this point is not too good. You have a statement which I wrote. I would be very happy if you

could give that to me because I signed that statement at the time it happened.

THE COURT: You prepared the statement yourself?

THE WITNESS: No, Mr. Rathborne's attorney at that time prepared it. And, I edited it and had it reworked. I felt it was more representative.

Q (By Mr. Jacobs) The attorney was Mr. Davis, wasn't it?

A Yes, I believe so.

Q I show you Exhibit 35 for identification, a statement of yours and ask you if that is a statement of yours that you just referred to?

(Exhibit handed to witness.)

A Yes, sir.

Q Does that refresh your recollection? Will you look at the statement and see if it refreshes your recollection of what you now recall about the conversation with Mr. Garfinkel?

A Yes.

Q What did he say?

A He said that ----

THE COURT: Tell me the words that Mr. Garfinkel used as near as you can. This statement is in lawyer talk. Tell me what he said.

THE WITNESS: He indicated ----

THE COURT: No, what did Mr. Garfinkel say to

Mr. Rathborne?

A I can't repeat the language verbatim. I can indicate what the tenor of the conversation was. In essence that Prescott had brought this upon himself by his lack of cooperation and that it probably was only the beginning; and, Sol really was very angry. I assumed he was just blowing off steam. I wasn't paying much attention.

MR. JACOBS: What her assumptions were, I would move to strike, Your Honor.

THE COURT: Fine.

THE WITNESS: He was saying things that sounded very threatening.

THE COURT: For example?

THE WITNESS: Something to the effect that Prescott might come to sore harm if he continued to be -- if he continued whatever it was he was doing.

THE COURT: Prescott was just quiet and calm and peaceful?

THE WITNESS: Well, he just stood there, evidently exercising self-control and not replying in any way.

Q So from what you saw, it was Mr. Garfinkel who was paranoid and not Mr. Rathborne?

A I don't think he was paranoid. He was extremely angry.

When I'm angry, I don't consider myself paranoid.

THE COURT: All right.

MR. JACOBS: Nothing further.

MR. STEINBERG: No questions.

THE COURT: Call your next witness. Those witnesses who have completed their testimony can remain here or they don't have to remain. They can leave if they so desire. In other words, if you want to remain, you may. If you don't want to remain, you don't have to.

MR. JACOBS: Call Leslie Crossley.

LESLIE CROSSLEY

was thereupon produced as a witness in behalf of the plaintiff, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

MR. STEINBERG: Your Honor, may I ask the other witnesses be excluded from the courtroom?

MR. JACOBS: There are no other witnesses in the courtroom.

MR. STEINBERG: Is that the only witness you have?

MR. JACOBS: I have other witnesses on the way.

THE COURT: All right.

MR. JACOBS: No one else.

THE CLERK: Please state your full name and spell your last name.

THE WITNESS: Leslie Crossley, C-r-o-s-s-l-e-y.

THE CLERK: Leslie Crossley.

EXAMINATION

BY THE COURT:

Q What do you do?

A I'm a real estate broker.

Q Did you work with the lady who preceded you to the witness stand?

A No.

Q Did you have an office in the building?

A No.

Q Have you a statement for her?

MR. JACOBS: Yes, I gave it to you, Your Honor. Would Your Honor wish me to examine her?

THE COURT: That's all right. You have been in the real estate business for approximately years?

A That's right.

Q You have been a broker for two years?

A Right.

Q You are familiar with the 53rd Street and Third Avenue area and you have visited plaintiff's apartment seven or eight times between 1969 and 1971?

A That's true.

Q You think that's a pretty good apartment?

A I think it's a lovely apartment.

Q You think that apartment would rent, both of them together for about 1200 to $1500 a month?

A I do.

Q Apartment No. 5 was valued at between six and $700 a month?

A That's correct.

Q So, what you are saying is that Mr. Rathborne had a real bargain there at $500 a month?

A He certainly did.

THE COURT: Anything further?

MR. STEINBERG: May I point out to you, this pretrial statement, I don't see this charring lady's name on here.

THE COURT: She has already testified. She just said Mr. Garfinkel is a very nice fellow and rented this very cheap to Mr. Rathborne.

MR. STEINBERG: No questions.

DIRECT EXAMINATION

BY MR. JACOBS:

Q Mrs. Crossley, in 1966, was there a difference in the neighborhood of East 53rd Street and Third Avenue as compared to 1972?

A I think so.

MR. STEINBERG: Your Honor, then they are not going to ascribe that to us?

MR. JACOBS: I am trying to show the value increased.

MR. STEINBERG: Just a minute. May I point out to you, counsel apparently doesn't know the landlord is bound by what we call rent regulations, rent stabilization and the conciliation and appeals board.

THE COURT: Is your judgment based in part upon the excellent furnishings in the apartment?

THE WITNESS: On the work that Mr. Rathborne did.

Q (By Mr. Jacobs) Mrs. Crossley, have you previously reviewed Exhibit 36 for identification?

A Yes.

Q Do you feel that's a fair representation of the apartment?

A Yes.

Q As it was in 1972?

A Yes.

MR. STEINBERG: Your Honor, that's not the way to qualify a witness.

THE COURT: She is a real estate person.

MR. JACOBS: Should I qualify her?

THE COURT: She said she looked at these pictures and it is a fair representation of what she saw. She doesn't have to take the pictures herself.

MR. STEINBERG: I will show her something too.

THE COURT: Wait until Mr. Jacobs finishes.

Q (By Mr. Jacobs) I will also show you Exhibit 37, would you say this is a fair representation of the roof terrace that Mr. Rathborne had in his apartment?

A Yes.

Q Would you tell us why this apartment, in your opinion, had a great value and why someone would pay a rent of 1200 to $1500 a month?

MR. STEINBERG: Your Honor, that's not the way to prove it.

THE COURT: I am going to let him prove it his way.

A For one thing, it had a very high ceiling, a lot of room, the quality of a house without being a house; it had an exclusive garden. It had six woodburning fireplaces which is very hard to find; and, it had the quality of country living within the confines of the city.

Q Now, are you considering, when you say twelve to $1500, the apartment furnished or unfurnished?

A Unfurnished.

Q In your experience as a broker, have you had other situations of apartments that were comparable to this?

THE COURT: What is the purpose of this?

MR. JACOBS: The purpose of this, Your Honor, is to show that this apartment had a value and that nobody in his right mind would move out of this apartment unless he was compelled to move out.

THE COURT: In other words, you are not ----

MR. JACOBS: I am not proving or attempting to prove damages.

THE COURT: This is a very nice apartment. You don't have to ask her those other questions. She

has already told you Mr. Rathborne was getting a real bargain. Anything else?

MR. STEINBERG: Just give me a moment to reflect.

CROSS-EXAMINATION

BY MR. STEINBERG:

Q Mrs. Crossley, do you know how old this house is?

A I don't know the exact year, no.

Q About how old would you speculate the age of this building?

A Seventy-five years.

Q Would you say it's more than 100?

A Could be.

THE COURT: What difference would it make? You might hire her as an expert on your decontrol because she says the apartment is a real good apartment. If the apartment has been decontrolled, you will need somebody like that. Why don't you leave her alone.

MR. STEINBERG: That's all.

MR. JACOBS: Your Honor, we have run into a problem. I have one witness coming, which Mr. Rathborne says is on his way here now. That's the architect. Your Honor has seen his exhibit. I don't know whether Your Honor or Mr. Steinberg requires his presence.

THE COURT: I don't know what the defense is.

HAROLD WILLIAMS HAUSER

was thereupon produced as a witness in behalf of the plaintiff, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Please be seated. State your name in full and spell your last name.

THE WITNESS: Harold Williams Hauser, H-a-u-s-e-r.

THE CLERK: Harold Williams Hauser.

DIRECT EXAMINATION

BY MR. JACOBS:

Q Mr. Hauser, can you tell me what your occupation is?

A Actuary.

MR. JACOBS: Your Honor, there is no witness statement for Mr. Hauser. This was on the question of damages. I did not expect to put him on today.

Q What is your job?

A I am a fellow that corporations come to to have their pension plans administered, set up values and calculate the cost of them.

THE COURT: To do what?

MR. JACOBS: To calculate what the damages would be for the value of the apartment.

THE COURT: If I hold that the apartment was decontrolled, how would that be relevant?

MR. JACOBS: There are two separate apartments. Even if Your Honor holds that one apartment was decontrolled, there is still a second apartment. The decontrol, Your Honor, was only for one apartment. Let me explain to Your Honor, there were the decontrol which dealt with one apartment, not the two.

THE COURT: Why couldn't he have charged him a thousand dollars for the one apartment?

MR. JACOBS: He could have moved out of the other and still had the first one of them. He could have moved out of Apartment 4 and still had Apartment 5.

THE COURT: Is the decontrol law still in effect?

MR. JACOBS: Yes it is, Your Honor.

THE COURT: Go ahead.

Q (By Mr.Jacobs) Mr. Hauser, can you calculate what, if a person needs, for example, one thousand dollars a year payable monthly, and you know the age of that person, can you calculate ---- .

THE COURT: He can.

Q -- to arrive at the realized $1,000 a year at plaintiff's age, 36, payable monthly, how much money would be required?

A $17,000.

Q How do you figure that?

A That is based upon the tables that we are using currently to calculate pension clauses.

MR. STEINBERG: I didn't hear you, sir.

THE WITNESS: That is based on the interest rate and the mortality table I'm using to determine pension clauses. The mortality table is a 1967 table which is based upon the average level of mortality in 1967. The interest rate if five per cent.

THE COURT: What is the interest rate now?

THE WITNESS: Interest rate, short term interest rates are much higher than five per cent. In making a calculation over a long period of time, you have to determine what you think is a reasonable rate over a long period of time. What we are using for pension clauses now is five per cent.

THE COURT: Even though utilities are paying about 11.8 for long term ----

THE WITNESS: Yes, the thing is, the gentleman is 36. He has an expectation of life of about 40 years.

THE COURT: All right. $17,000, five per cent yield.

THE WITNESS: Seventeen, that's at five per cent would yield $1,000 a year payable monthly.

Q During the course of his life?

A Right.

Q Would there be any appreciable changes in November, 1972, he was 34 years old; is there any appreciable difference in the amount?

A There would be a slight increase; if he were doing that, you would bring it forward. The factor, 17 as of today, if there was some sort of settlement, you would bring the back payment forward at five per cent interest.

THE COURT: What else?

MR. JACOBS: No further questions.

THE COURT: That's all. You may step down. Call your next witness.

MR. JACOBS: Call Mr. Zombonini.

GUISEPPE ZOMBONINI

was thereupon produced as a witness in behalf of the plaintiff, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Please be seated. State your name in full and spell your last name.

THE WITNESS: Guiseppe Zombonini, Z-o-m-b-o-n-i-n-i.

DIRECT EXAMINATION

BY MR. JACOBS:

Q Mr. Zombonini, what is your occupation?

A I am an architect.

THE COURT: You are what?

THE WITNESS: An architect.

Q What is your present job or occupation?

A I am an instructor at the School of Interior Design; also I am a dean of the New York School of Interior Design.

Q What is your background in interior design?

THE COURT: Is there any question about his qualifications?

MR. STEINBERG: I wouldn't raise any at this time.

THE COURT: Go ahead.

Q Mr. Zombonini, I call your attention to October and November, 1972, did you meet Mr. Rathborne at that time?

A Yes.

Q How did you come upon meeting him?

A Well, he came to the school to seek for a design or someone to appraise his apartment.

Q Did you undertake to appraise his apartment?

A That's right.

Q How many times did you go to his apartment?

A Well, hard to say, between 15 and 20 times.

Q Did you make any sketches of his apartment, take any photographs?

A I measured -- I did measure the staircase, the fourth and third floor; and, I drew the new plants also. I made a photographic report in color pictures and black and white pictures.

THE COURT: I have those pictures here. What is it you want to know from Mr. Zombonini?

MR. JACOBS: I want to establish through Mr. Zombonini what his value of the various improvements that were made in the apartment.

Q (By the Court) You weren't the designer of these improvements?

A No.
Q Do you know who did the design work?
A No.
Q Did you conclude that the architectural work was professionally done?
A Yes.
Q And, was it good work?
A Yes.
Q How long had it been in at the time you saw it? What was the life expectancy of the work that you saw? Could it last ten years, fifteen years, twenty-five years?
A Last much more than that.
Q How long would the building last?
A I don't know if I'm in a condition to answer that.
Q That building is pretty old, isn't it?
A Yes.
Q Assuming that the building would last for twenty or thirty years or whatever figure you arrived at, then you made your calculations?
A Well, there are building interiors which will last much more than that. We have interiors 200 years old.
Q Could you take those interiors out?
A Well not without ruining the original characteristics.
Q You are appraising the work that was done to improving

the apartment?

A Partially. He also had to decorate the apartment.

Q What did you conclude was the reasonable value of these improvements?

A Architectural improvements and design work and decoration work, which has been appraised on that report comes to around $60,000.

Q Sixty-thousand dollars?

A This is not the precise figure. The figure would be on the first part of the report. It's something over $60,000. Can I have a copy of the report?

MR. JACOBS: I have a copy, Your Honor.

(Document handed to witness.)

A The last figure which includes architectural design comes to $60,398.75.

Q What did you find had been done to the apartment?

A The answer is all explained in this long report. We are talking about structural improvements like the building of walls.

MR. STEINBERG: I don't hear you, sir.

THE WITNESS: Architectural improvements. They regard construction or demolishing part of the building in order to improve the use of the space, rewiring, electrical rewiring, changing of tiles on the floor ----

THE COURT: How did you know what he had done?

MR. JACOBS: Maybe I can develop that, Your Honor.

Q (By Mr. Jacobs) Mr. Zombonini, were you shown the original plans of the apartment?

A Oh, yes. It's very hard for me ----

THE COURT: I can't hear you.

THE WITNESS: It's very hard for me to leave alteration without reading the report because all the alterations are here. Anyway, we have two sets of plans. The original plans ----

Q Where did you obtain the original plans?

A The original plans was drawn by Fred Leeman. It was given to me by Mr. Rathborne.

MR. STEINBERG: Are you talking about the plans of the building, sir, or are you talking about the plans of the apartment? I just want to know.

THE COURT: I don't know either. Were these the plans for the building or the plans that were designed by the architect for the plaintiff, Mr. Rathborne?

THE WITNESS: Well -- (pause)

THE COURT: Do you know?

MR. STEINBERG: These are the plans of the apartment, Your Honor, not of the improvements in the

building. Fred Leeman is the architect for the building. This gentleman is testifying about matters that is none of his concern. I think we are limiting ourselves to the work to be done to the interior apartment. If you are going to tell the Judge these were for structural repairs inside, I want to hear you make a declaration to that effect.

MR. JACOBS: Well, Your Honor ----

THE COURT: Tell me what you did.

THE WITNESS: For instance, on the first plan, the first floor, we have two bedrooms. Now, Mr. Rathborne told me he took this wall away in order to create the new bedroom. So, I measured the new bedroom. This is the black one. This is the plan I drew. And, the difference between this plan and this is what I have evaluated as architectural changes.

THE COURT: Then what else did you do?

THE WITNESS: So, this is from the situation. This is the building or apartment which is the same thing in the case, as it is now. This is the way I was told it was before Mr. Rathborne started improvement.

THE COURT: You are trying to appraise the improvements which were installed by Mr. Rathborne?

THE WITNESS: That's right.

THE COURT: You are not talking about any structural changes that were made by the building itself?

THE WITNESS: I don't know about that. I don't know. I cannot prove this is structural changes. What I'm proving my appraisal, how much the changes would cost in case it was done.

THE COURT: All right.

THE WITNESS: The effect it was done is proved by the original plan and the plan that I measured and draw myself.

MR. STEINBERG: If Your Honor please, I'm sorry. I don't want to interfere. I don't understand this at all. Is this gentleman saying that there were improvements within the interior of the apartment by Mr. Rathborne which gave you a basis for evaluation of the cost of interior improvements; is that what you're saying?

THE WITNESS: Yes.

MR. STEINBERG: In other words, you're saying that Mr. Rathborne took a wall on the plans of Fred Leeman and removed it and made improvements for the interior part of the apartment; is that what you're saying? Answer the question.

MR. JACOBS: Your Honor, can I examine the witness?

THE COURT: He can answer that question. I don't know whether that's true or not. You are appraising the improvements that were made according to these plans?

THE WITNESS: Yes, I cannot prove at all if the plan was made by Mr. Pathborne.

MR. STEINBERG: You can prove that?

THE COURT: He is not saying that.

THE WITNESS: I cannot prove that.

THE COURT: Why did it cost so much? Did they put in new walls and new floors? What was done to account for the $60,000?

THE WITNESS: Well, I'm afraid I have to go through the appraisal because I would not remember. The operation -- it took me a long time to go through the operation. We have, for instance, installation of water radiator.

MR. STEINBERG: What?

THE WITNESS: Installation of water radiators; installation of two electric radiators; installation of wall air-conditioning unit on the wall; this is not part of that.

Q (By the Court) Were there new floors installed?

A I don't remember about the new floors. I will have to go through this.

Q How about the wall?

A One of the ceilings was leveled on the fourth floor. I remember that. In the living room through the old hallway, the ceiling was lowered. This structure evaluation ----

MR. STEINBERG: By whom?

THE WITNESS: I cannot prove that.

MR. STEINBERG: Your Honor, we must know that.

THE COURT: You can't get it from this witness. He doesn't know.

MR. JACOBS: Your Honor, I can put Mr. Rathborne back on. He will testify as to all this if you want the details.

THE WITNESS: We have the restoration of the fireplaces. There are five fireplaces in the two floors. Some of the walls were plastered. So the plaster was removed in order to show the brick wall.

Q How did you determine value?

A Value of what?

Q Of these improvements.

A Well, in the case of the restoration of the brick wall, we have cost due to the removal of the plastering and cleaning the brick, which requires a very long operation; requires cleaning, requires electric tools.

Q Are you making any judgment on whether this was the

most effective way of improving or are you just saying this would be the cost of replacing those improvements?

A This would be the cost of replacement of the improvements.

Q In other words, you are not determining whether you would have done it the same way?

A Well, in case of the brick wall, yes, I would have done that.

Q What about the other things?

A We should be more precise and decide which ones. We have too many operations. I don't remember all of them. We have talked about 28 pages.

THE COURT: I am going to assume if the appropriate questions were asked, he would testify in accordance with his statement and turn him over for cross-examination.

MR. STEINBERG: Do you mind if I interrupt a moment?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. STEINBERG:

Q The air-conditioning unit is a matter that can be taken out and carried with him to another accommodation?

A What's that?

BRADLEY DAVIS

was thereupon produced as a witness in behalf of the plaintiff, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Please be seated. State your name in full and spell your last name.

THE WITNESS: Bradley D. Davis, D-a-v-i-s.

THE CLERK: Bradley D. Davis.

EXAMINATION

BY THE COURT:

Q You are a duly licensed practicing attorney in the State of New York?

A No, I'm not practicing.

Q You represented Mr. Rathborne?

A Yes.

Q For what period of time?

A From the spring of 1971 until November, 1972.

Q Is that when you gave up the practice of law?

A Well, no, I gave up the practice shortly after Mr. Rathborne left New York, after that time.

Q You weren't the one who filed this action or were you?

A I originally filed this action. That was the last representation I did. I believe it was filed

approximately a month after he left.

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MR. JACOBS:

Q Mr. Davis, did you first represent Mr. Rathborne in other matters other than problems with the landlord?

A Yes, I did.

Q Do you recall when you first began representing him with regard to his landlord?

A It would have been the end of 1971.

Q And, do you recall the first matter in which you represented him?

A Yes. The first court matter was a rent overcharge action.

Q Could you tell me prior to bringing this rent overcharge action, did you speak to Mr. Garfinkel or Mr. Steinberg about the rent overcharge?

A Yes, of course ----

Q Who did you ----

A Before bringing the lawsuit.

Q Who did you speak to?

A Spoke to Mr. Steinberg.

Q What did you say?

MR. STEINBERG: If Your Honor please, this is a matter of courtesy and ethics.

THE COURT: I don't think that makes very much difference. There is no privilege involved in this. When he gets on the stand, his client waives privilege. He might have had a conversation between himself and his client. I don't think that a conversation between two lawyers is privileged. I think we are wasting a lot of time.

Did you file an action subsequently?

MR. JACOBS: Your Honor, I think the manner in which the landlord and his attorney acted when asked to do things, they refused to do it and made the client go to court. I think this has a lot to do with it.

MR. STEINBERG: I am not a defendant.

THE COURT: Give me your legal authority?

MR. JACOBS: Me?

THE COURT: Yes, give me your legal authority.

MR. JACOBS: I have none.

THE COURT: Then go to something else.

Q (By Mr. Jacobs) Did you file a rent overcharge case?

A Yes.

Q Could you tell us what happened in that action?

A There was ultimately an award of $2,000 plus attorney fees.

Q Now, during the course of that action on February 1,

Q What did you say?

A No one at that point had any response to that. Mr. Steinberg held back Mr. Garfinkel. I would say my client didn't say anything. I restrained him from saying anything.

THE COURT: Go ahead.

MR. JACOBS: I would also offer at this time, Your Honor, Exhibits 42 and 43, which are the orders fixing the amount of rent on these two apartments. I have shown these to Mr. Steinberg.

THE COURT: What was that?

MR. JACOBS: Two hundred fifty dollars for each apartment.

THE COURT: All right.

Q (By Mr. Jacobs) Mr. Davis, also when you began representing Mr. Rathborne, was he occupying any other space in the building other than the apartments 4 and 5?

A Yes.

Q Where?

A It would have been the floor below, a small, I guess it would be an office room.

Q And, that was the floor below?

A It was the floor below. The lower of the apartment.

Q Do you know if he was paying rent for that?

A Yes, he was.

Q Do you recall how much it was?

A No, I don't.

THE COURT: Do you know how much it was?

MR. JACOBS: I believe it was $100 a month, Your Honor.

THE COURT: All right.

Q (By Mr. Jacobs) Did you communicate with either Mr. Garfinkel or Mr. Steinberg about that business space?

A Yes.

Q Who did you communicate to?

A I communicated to Mr. Steinberg. He was the attorney.

Q Did Mr. Rathborne say he wanted that space?

A No. Mr. Rathborne said he had been compelled to take the space.

Q By whom?

A By Mr. Garfinkel.

Q Then what happened?

A I told him he was under no obligation to continue staying in the space.

Q (By the Court) What did Mr. Steinberg tell you or Mr. Garfinkel tell you?

A Well, Mr Steinberg said, "We'll see you in court about that."

Q He told you he would see you in Court. He wanted you to continue?
A He wanted to continue the occupancy. He said it was to continue.
Q What happened?
A I told Mr. Rathborne there was no requirement for him to continue in the space. He vacated the space.
Q Then what happened? Was there an action brought?
A I'm trying to recall. There was no recovery in any action brought.
Q Was the action brought?
A I don't recall the action. If in fact there is a paper, I would say I don't recall.

MR. JACOBS: I have no information on whether an action was brought.

THE COURT: What is your next point?

Q (By Mr. Jacobs) Mr. Davis, did there come a time when the plaintiff complained to you about an air-conditioning unit on his roof terrace?
A Yes.
Q When was that?
A That initial complaint would have been in the spring of 1972.
Q Did you ever ask either Mr. Steinberg or Mr. Garfinkel to have that removed?

A Yes.
Q Who did you ask?
A Mr. Steinberg.
Q What did he say?
A He said it was not going to be removed. He had no right to have it off there. It was not going to come off.
Q Did you subsequently commence an action on behalf of Mr. Rathborne in the New York State Supreme Court seeking an injunction with regard to that air-conditioning unit?
A Yes.
THE COURT: Did the judge enter a preliminary injunction?
THE WITNESS: No.
Q The judge denied the preliminary injunction?
A The matter came to trial.
THE COURT: He moved out and the case was dismissed?
THE WITNESS: That's right.
THE COURT: Go ahead. What is your next point?
Q (By Mr. Jacobs) In the course ----
A May I -- I do recall that there was an action brought for rent on the commercial space which was terminated prior to trial. There was no payment made on it. It

was withdrawn.

Q Did you represent Mr. Rathborne with regard to any other actions brought by Mr. Garfinkel for rent that wasn't paid?

A Yes. Well, in the summer of 1972, Mr. Garfinkel was refusing tender of rent commencing ----

THE COURT: Why was that rent tender refused?

THE WITNESS: I have no idea why he wouldn't accept it.

Q Had he maintained an action to evict him prior to that time?

A There had -- well, these two actions that I mentioned in this case which had been settled were both prior to that time.

THE COURT: You mean ----

THE WITNESS: There was no pending eviction action prior to that time.

THE COURT: After the Court had decided $250 a month was the maximum rental that could be paid for each of these apartments, you say that you tendered the rent of $250 a month for each of these apartments to Mr. Steinberg or to Mr. Garfinkel and they refused to accept it?

THE WITNESS: I did not tender the rent. I directed the tendering of the rent.

THE COURT: What happened after he refused to accep' it?

THE WITNESS: An eviction action was commenced by Mr. Garfinkel.

THE COURT: Then what happened?

A That action was dismissed.

THE COURT: Was that ----

THE WITNESS: We paid the rent; we tendered the rent; and the judge, who I don't recall, in this case it was just a hearing, a landlord-tenant sort.

THE COURT: Was there any correlation between that and the $100?

THE WITNESS: The $100 case was entirely separate and earlier.

THE COURT: How many actions did you bring against Mr. Garfinkel and his corporations?

THE WITNESS: Including court actions or Rent Commission proceedings?

THE COURT: How many court actions were filed by you on behalf of Mr. Rathborne?

THE WITNESS: There was the rent overcharge action; there was the action for the removal of the air-conditioning unit; there was this action.

Q (Continued by the Court) How many actions were brought before the Rent Control Commission?

A Filed by us, there was the harassment proceedings ----

MR. STEINBERG: Your Honor, he said "this action". I don't understand that.

THE COURT: The one we are here on.

MR. STEINBERG: Okay.

Q You filed a harassment proceeding?

A Yes.

Q What happened to that?

A Well over a year after Mr. Rathborne moved out of the apartment, the Rent Commission sent a letter saying they were sorry they hadn't gotten around to the matter. They assumed the matter had been attended to. If it hadn't, to correspond.

Q What happened?

A Well, I wrote them that the matter had been attended to; the tenant had to leave because of the harassment the year before.

MR. JACOBS: Your Honor, if you wish that letter, I have it.

THE COURT: That's all right.

How many actions did Mr. Garfinkel file against your client?

A One, two, three -- I believe four eviction proceedings during the time I was representing him and a debt control proceeding.

Q How long have you known Mr. Pathborne?
A Since the spring of 1971.
Q Did you take over your first case from another lawyer?
A Well, the first matter I dealt with was a tax matter, yes.
Q He was convicted of tax fraud?
A I did not have anything to do with the court matter.
MR. JACOBS: I believe it was a civil tax problem.
A He was having a civil tax audit. Another attorney had been handling it. I took it over.
Q Would you say that Mr. Pathborne is an easy-going quiet dissident individual or is he excitable?
A He is not an easy-going quiet dissident individual.
Q Is he a difficult person, would you say?
A That depends on when we are talking about, not when I first met him; he was not quiet.
Q You sent him to see a psychiatrist, didn't you?
A Yes.
Q When was that?
A Well, that would have been in the fall of 1972, after I knew him for over a year.
Q Did he tell you whether he had ever been to a psychiatrist before?
A I don't recall his telling me that, no.

Q You thought ----

A I recall he didn't like the concept.

Q But you thought he should see a psychiatrist?

A Oh, yes.

Q Why?

A Well, his entire state; he was sometimes functioning as far as I could tell, irrationally. He was in a state of terror at this point. It wasn't a legal problem.

Q But you didn't find him to be such a person when you first represented him?

A No, no. What I'm saying, he was not an easy-going quiet person. He was a person I could discuss matters with; a very interesting person.

Q What about Mr. Garfinkel?

A Mr. Garfinkel, I didn't have that much communication with other than in court. Generally, as a lawyer, I would speak to Mr. Steinberg.

Q Is Mr. Garfinkel an excitable person?

A The times I saw him in court, I would say he is, yes.

Q What about Mr. Steinberg?

A A very excitable person.

Q After Mr. Rathborne left New York, you gave up the case; is that correct?

A Well, the pending matters became moot at that point.

He vacated the apartment.

Q Didn't you represent Mr. Rathborne after he left New York also?

A Well, yes. I thought you meant gave up the case. Those were the cases that were pending at that time, yes.

Q You filed this action alleging he was a resident of the State of Louisiana?

A Yes.

Q That's how you came into this court?

A Diversity, yes.

Q Did you ever hear Mr. Garfinkel or Mr. Steinberg attack verbally or physically Mr. Rathborne other than that one time before Judge Wahl?

A Yes.

Q Tell me about that.

A I had on September 14, 1972, went to Mr. Steinberg's office. This was when matters had become considerably worse. It was after the electrical problem, which I assume has been testified to here.

Q What about the electrical problem?

A Well, this was for ----

MR. JACOBS: Your Honor, if I could examine him, I could bring up the continuity of everything, if you like.

THE COURT: I think we will get along a little better if I ask him the questions. At least we'll get all the information and it wouldn't take so much time.

THE WITNESS: For five weeks in the summer there was no electricity.

Q How do you know?

A I was in the apartment.

Q Did you communicate with Consolidated Edison?

A Consolidated Edison was not allowed to have access to the basement when they came to make the repairs on several occasions.

Q You were there?

A I spoke to Consolidated Edison. I spoke with Mr. Steinberg.

Q In your conversation with Mr. Steinberg, did he tell you why they wouldn't give access to the basement?

A He said to me, "We are not giving it. If Mr. Rathborne wants to play dirty, we'll play dirty." That was one of the statements.

Q He said that with reference to what?

A He was obviously referring to the pending action on the air conditioner. It clearly came up in that context. And finally, we had to obtain a court order.

Q To do what?

A To permit access to repair the electrical unit.

Q Why did you want the air conditioner removed from the terrace?

A Mr. Rathborne wanted it removed. I can see very valid reasons for it.

Q Did Mr. Steinberg ever tell you they had agreed to allow Munchtime permission to put this air conditioner there prior to the time of the lease? Was there any discussion of that?

A He didn't say they had agreed to give it prior. He said it was Munchtime's unit; they had to have it.

My examination of the records show it was given after the time of the lease and also from what Mr. Rathborne told me. But, this was not an air conditioner. These were large units occupying a substantial portion of the surface.

Q What kind of business was Munchtime?

A They sold quick lunches, hot dogs.

Q It was a restaurant?

A Without seating, it was a stand-up type.

Q It was a food dispensing operation?

A Yes.

Q It was your theory they had no right to install this on the terrace?

A Yes. The lease had given Mr. Rathborne exclusive use

of the terrace.

THE COURT: Anything else?

MR. JACOBS: Yes.

Q (By Mr. Jacobs) Mr. Davis, I show you Exhibits 44 and 45 for identification and ask you if these refresh your recollection? Was there any connection between the petition for eviction and the rent overcharge case?

A Yes -- well, this action entirely, No. 105978 of '71, was an eviction action commenced on December 30, 1971, for nonpayment of $500.

THE COURT: Don't the documents speak for themselves?

THE WITNESS: Yes, I think so.

THE COURT: They are admitted.

MR. JACOBS: Your Honor, I would like to offer the letter.

THE COURT: Admitted.

Q (By Mr. Jacobs) Now, Mr. Davis, was there also a problem with the fire department?

A Oh, yes, yes.

Q Could you tell us about that?

A Well, in June of 1972, Mr. Steinberg initially, I believe, sent a letter complaining about a lock to the door -- to the fire exit to the terrace to the effect

the lock had to be removed.

THE COURT: Did he send you a copy?

A Whether I had a copy of the initial letter -- no, this was sent to Mr. Rathborne, the initial letter, demanding the removal of the lock. This was a stairway to Mr. Rathborne's terrace, not through his apartment, but from the hallway. This was the same time that the front door lock downstairs was totally removed; so, this other lock also was removed. Anyone could enter Mr. Rathborne's place from the streets unaided. I then indicated we would deal with and work out something with the fire department.

THE COURT: Did you?

A No. It was never -- he finally moved out before the matter was resolved.

Q (By Mr. Jacobs) Did Mr. Garfinkel appear in court to answer these matters in this regard?

A There was a violation placed against the premises by the fire department. I appeared in court on the matter.

Q Did you discuss this violation with Mr. Steinberg?

A Yes.

Q What did he say?

A He said, "Have him remove the lock."

Q Did you explain the security situation?

A Yes. He said, "Well, that's too bad. That's the fire

law.

THE COURT: Was it the fire law?

THE WITNESS: My understanding from having spoken with the fire department, it was not. They said it could be there.

THE COURT: They said a safety lock could be on this door in dispute?

THE WITNESS: There was a violation issued. I could give you my opinion how. But, I don't think that's right for the case.

THE COURT: Did you discuss the matter of evicting Mr. Rathborne because of this violation with Mr. Steinberg?

THE WITNESS: Mr. Steinberg said, "If we get an established violation on this, we are going to put him out for having a substantial violation of his lease."

Q (By Mr. Jacobs) I show you ----

A Which was one of the major reasons we defended the matter.

Q I show you Exhibit 7 and 47. Are those two letters from Mr. Steinberg which you saw with regard to this fire violation?

(Exhibits handed to witness)

THE COURT: Have you any more exhibits?

THE WITNESS: Do I have any more exhibits?

examine the witness. He should cross-examine from his testimony. So I want to bring out testimony.

THE COURT: That's fine. Why didn't you do what I asked you to do and put in all those exhibits so we wouldn't have to identify each exhibit separately?

MR. JACOBS: Your Honor, I won't offer any more exhibits at this time. Can we just go on with the testimony?

THE COURT: All right.

Q (By Mr. Jacobs) Now, Mr. Davis, I believe you mentioned it before that you got an order giving access to the basement for the electricity. Could you tell us what you did to get it? What happened?

A In the case that was pending against Munchtime and Mr. Garfinkel's corporation, I made a motion by order to show cause why access should not be given; and the motion, after argument, was granted and an order was issued and then served and then access was given.

Q In September of 1972, I think you started to talk before about that. Did you attempt to negotiate on behalf of this plaintiff for his getting out of the apartment?

A Yes.

Q Who did you talk to?

A Mr. Steinberg.

Q Could you tell us where this was?

A This was at Mr. Steinberg's office.

Q Who was present?

A Mr. Steinberg was.

Q Was anyone else?

A I believe a portion of the time Mr. Steinberg's secretary.

Q Was Mr. Rathborne present?

A Mr. Rathborne was present for a portion of the conversation.

Q Could you tell me what the conversation was?

A Well, the initial conversation for which Mr. Rathborne was present was that we were up there to explore if there was any way to arrange the end of all these issues. At this point, the Rent Commission matters were pending.

Q You mean the decontrol proceedings?

A The decontrol proceedings, yes. Mr. Steinberg said there is a way to arrange it, Mr. Rathborne gets out of there. I said, "Obviously, that's not any type of settlement."

THE COURT: Did you ask him for any money?

A We never reached the point of asking for money. Mr. Rathborne then stated, "It would end if you would stop harassing me." Mr. Steinberg then asked if Mr. Rathborne would leave the room.

THE COURT: Who asked that?

THE WITNESS: Mr. Steinberg asked Mr. Rathborne to leave the room. He wanted to talk to me. And, Mr. Rathborne then left the room. I then said to Mr. Steinberg, "I would like to work out some type of settlement. But, as you know, there is a substantial investment in this apartment. It would not be a minor matter." Mr. Steinberg said, "They would give two cents to settle the matter. They were going to get him out. They already had an order on one apartment. They were going to get him out of everything." I said, "Well, you just have a preliminary decision. You know these cases, I don't agree with that decision. The matter can go on. You can pursue whatever legal means you want. We will pursue whatever legal defense we want." He said, "Don't tell me what kind of means we'll pursue. We'll pursue any kind of means we want. You know what happened on that block." So, I said, "Well I assume that you will pursue the legal means anyway. I'm sorry we can't resolve matters. I thought you had a substantial interest in getting Mr. Rathborne out of the apartment." He said, "We've got no interest in getting Mr. Rathborne out of the apartment." I said, "It's a block under assemblage." He said, "We are not part of that. We

were offered a million dollars. We didn't take it. That's not our concern. We just want that son of a bitch out." I said, "I guess we have to pursue our action. There is nothing further to discuss." I left.

THE COURT: Mr. Davis, did you represent Mr. Rathborne in the decontrol proceedings?

THE WITNESS: Yes, to the extent there was a hearing.

Q (By Mr. Jacobs) Was there a hearing?

A No.

Q To your knowledge, did the hearings examiner ever go up to the premises?

A No.

MR. STEINBERG: I object to that. That's based on collateral attack.

MR. JACOBS: Your Honor, I have a case I would like to argue on that.

THE COURT: Tell me the case.

MR. JACOBS: I have it here, Your Honor.

THE COURT: Tell me the facts of the case.

MR. JACOBS: This is a New York State Court of Appeals case, Your Honor, involving an action where there were drivers -- your Honor, let me put it to you this way. The holding of the case ----

THE COURT: I am not interested in the holding.

Tell me the facts of the case.

MR. JACOBS: The facts of the case were there were two actions. The question was ----

THE COURT: Wait a minute. Where was the first one filed? Tell me about the first one.

MR. JACOBS: The first action was by the driver of one of the cars.

THE COURT: A driver of one car filed an action against the driver of another car for what?

MR. JACOBS: For damages.

THE COURT: All right.

MR. JACOBS: Then subsequently, there was another action by the second driver, the one who lost the first case against a third driver involved in this situation. The Court held that there was collateral estoppel.

THE COURT: There was.

MR. JACOBS: But the Court stated that to have collateral estoppel, you have to have two things: There must be identity of issues decided in the prior action. I don't argue with that. The second is there must have been a full and fair opportunity to contest the decision now said to be controlling.

THE COURT: Are you saying it wasn't done in accordance with the rules of the agency?

MR. JACOBS: Absolutely. My client filed the

appeal, Your Honor. I submit if Your Honor holds that there was harassment here, it was because of the action of the landlord that he was out of the apartment and he had no right to appeal; it was moot. I submit it was the actions of the landlord.

THE COURT: Tell me what case you are relying on for that?

MR. JACOBS: I can't find any case, Your Honor. But, look at the logic. The man is entitled to his day in court. Did he have his day in court? We have the lawyer here. There was no hearing. No one looked at the apartment.

THE COURT: There was no hearing. There was no one who looked at the apartment. Go ahead.

Q (By Mr. Jacobs) After the protest was filed, did Mr. Rathborne leave the apartment before the process was heard?

A Yes, after a stay had been issued and before any hearing of the protest what the determination would be.

Q Now, you have testified about numerous conversations and threats that were communicated.

THE COURT: Ask him the questions without the long windups.

Q I am asking whether there were any other threats than what you have testified to today that you recall

JOHN PHILIP CASARINO

was thereupon produced as a witness in behalf of the plaintiff, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Be seated. State your name in full and spell your last name.

THE WITNESS: John Philip Casarino, C-a-s-a-r-i-n-o.

THE CLERK: John Casarino.

EXAMINATION

BY THE COURT:

Q Dr. Casarino, I understand you graduated from Notre Dame. Then you went to medical school. Where did you take your psychiatric training?

A My psychiatric training was at St. Vincent's Hospital here in Manhattan.

Q You are Board certified?

A Yes.

Q At the suggestion of Mr. Davis, did you examine the plaintiff?

A I did.

Q When was that?

A That was October 9, 1972.

Q Did you get a history from him at that time?
A Yes.
Q What was that history?
A Well, the history was that Mr. Rathborne had contracted this space; and he said his problems began -- these are notes that I typed up. Is it all right if I refer to them?

THE COURT: Certainly. I am more interested in his prior health problems.

A. Well, when he presented himself to me, he was extremely distraught, extremely disorganized. It was very difficult getting a history from him. As a matter of fact, my last statement over here said, "At this time, little is known about his premorbid personality which prevents a clear elucidation diagnosis." That's why we had several sessions. I didn't feel my initial one was enough. I did get some family history.
Q What year was that?
A 1972, October.
Q You found that he was somewhat disorganized?
A Yes, sir. I felt he was on the verge of a psychosis decompensation.
Q Did you find he was unable to answer questions very well?
A Yes, my questions, yes.

Q What else?

A What did I find in terms of his mental stability from a psychiatric point of view?

THE COURT: Yes.

A He displayed psychomotor agitation; his thinking was disorganized. I felt that his mood was depressed. He was unable to sit down. He paced about the room a great deal. He brought a dog with him which he stated was for protection. He was very much frightened. His thinking was very tangential. When a question was asked, he did respond appropriately. But many times, he went on to other areas showing thought process disorganization. He didn't show any hallucination or secondary symptomatology or anything like that. There was a flavor of paranoid thought.

Q By paranoid, what do you mean?

A Well, I was not to sit down there and say that what he alleges was true or not true; but that some of the statements that he made, if they were not true, would go along with the findings of disorganization insofar as they would indicate psychotic episodes. Were they true, I don't think they would make a difference anyway.

Q Did you know when the onset of that difficulty arose?

A Yes -- well, somewhere along the way he mentioned in June, he stated he ventured out of his house rarely,

stopped seeing friends; he hadn't dated in several months.

THE COURT: He hadn't done what?

THE WITNESS: He hadn't dated in several months and lost twenty pounds; had crying episodes which he could not control and was very irritable.

He also purchased the dog and would allow the dog to check the rooms in his house because he was afraid someone was there. He believed his personality was changing and that he was becoming depressed.

Q Is he a volatile individual or quiet or what kind of person?

A When I saw him he was -- I would say volatile. When I saw him -- I saw him several times. This time, the second time I saw him, he was a bit more acutely disturbed, still not on the verge of overt psychosis. I felt it was heading in that direction. I made the recommendation he be on medication and he entered psychotherapy at that point.

Q Did he?

A No. He said he would be afraid to take medicine because he might be moving to New Orleans. He didn't think he would want to be getting into therapy at this point.

Q Did you prescribe any for him?

A No, I gave him no medicine.

Q So, he didn't come to you for treatment. He came because of his attorney to prepare for testimony?

A Yes, sir. I recommended that he have treatment. Then when he said he was going down to New Orleans, I agreed this would help him since I thought a change of environment would, and when he got down there, he should get involved in therapy. He subsequently wrote me a letter that said he had seen a couple of doctors down there and was working it out. I saw him a year ago also when he returned to New York.

Q How did you find him then?

A That was last year -- I guess it was this year, March 8th of '74. On March 8th, he was in New York. And, he phoned to ask me if he could see me. He had written several letters during this period of time and told me about his experience with different doctors down there, how he was in treatment with one and asked some advice about should he continue this kind of business. I felt we established a good relationship in the few times we had met. Anyway, I saw him this time. He was very much relaxed. He was smiling; his speech was not pressured. It was none of this disorganization I originally noted.

Q Does he act differently when he is interrogated by

people whom he regards as friendly and with people who he regards as hostile?

A Well, I guess that would depend, I guess, maybe on the base line frame of mind that he was in at the time. I am not exactly sure what you mean, sir.

Q I see an individual here in May of 1974, which is the time you saw him the second time, isn't it?

A No, in March of '74, that was like the fourth time, I said.

Q You saw him then?

A Yes.

Q I see a man who is evasive and who refuses to answer questions and who asked for explanation constantly and who avoids answering questions and who asks the question to define his terms constantly. Does that indicate a person who has psychiatric problems? That doesn't sound like your concluding sentence in your statement.

A Well, that's what I saw at the time. I can only say, in relation to when I initially saw him, there was that change. Certainly the basic personality would come out, given stress, sure.

Q Even at the time you thought he was so much better?

A Yes. Remember I'm comparing the two times when I thought this was psychotic.

Q You didn't have this type of response from him when you asked him questions. He answered them frankly and completely.

A The last time.

Q Did he ever ask you to define your terms?

A I don't think so. Well now, the nature of our last visit was kind of like he was coming to New York and wanted to see me and wanted to give me a progress report of what had happened. As I said, he had been writing me letters, I guess, to fill me in on how he had been doing. I think this was just to do that in person.

Q You are not aware if he had any psychiatric problems prior to the time you saw him? I am not talking about a week before. I am talking about five years before.

A Well, I did obtain a history of the discharge from the service. And, at that time I asked if he saw a psychiatrist. He said he had seen one. I asked him that on the first visit.

Q Do you know whether he was discharged under honorable conditions?

A I don't know that. I just know he was discharged. I think he was AWOL. I don't know anything other than that.

Q What are you here to testify to?

A I suppose how I viewed Mr. Rathborne initially at the time of October 9th, and then more recently.

Q In other words, you are here to give me the benefit of your advice on the conditions which you observed when you saw him the first time?

A Yes, October of 1972.

Q You found a very distraught and nervous and upset individual?

A I would say on the verge of a psychotic decompensation of a paranoid type.

Q When you saw him again, you found a man who was not suffering from any psychiatric problems, would you say that?

A My aim at that point was not to do an examination on him. The last time I saw him, I noticed he was relaxed; he was comfortable; and, the symptoms I had been alerted to initially were not present. At that point, had I wanted to get a full psychiatric evaluation, I would have got my full evaluation. That was not called for.

Q Do you want to ask him anything else?

MR. JACOBS: Very briefly, Your Honor.

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MR. JACOBS:

Q Dr. Casarino, the condition that Mr. Rathborne was in when you saw him in October, November of 1972, you have described in medical terms. Can you describe it in lay terms what you mean by that?

A Well, basically he was very frightened; so much so, I was impressed that he brought this dog to the apartment; and, I became a little afraid of him. He had difficulty sitting still. He would get up and walk around. He was very agitated. His sentences were fragmented. They were not flowing sentences. It was difficult at that time to get a full elucidated history. There were these -- although there were no secondary symptoms such as hallucinations or delusions, I did feel there was referential radiation; that's when the events were happening outside you are taking to be reflected as being connected with you. The main thing was in the disorganization in the thinking.

Q Would you say he was on the verge of a nervous breakdown?

A Definitely.

Q Had he remained in the apartment, can you tell us in your opinion what would have happened to him?

Q Now, as I started to say, Dr. Casarino, had he remained in the apartment in New York and did not go into therapy and did not take medication, can you tell us, in your opinion, what you think would have happened?

A I felt he would have become psychotic.

Q What did the move to New Orleans, what would that do for him?

A Well, first of all, he saw it as an aid when he described it to me. In other words, in these sessions when I made suggestions to him for medication or that he should be in therapy, he said, you know, he might have to move; that he would do it down there. And, it was my feeling that eliminating the stress, as he perceived it, would be certainly helpful to him.

THE COURT: Why do you add, "as he perceived it"?

THE WITNESS: Well, because it's not my judgment. I don't judge what happened to him. I just judge on what I see.

MR. NICOLS: Your Honor, I call your attention to page 376 of the deposition. Actually the last line -- last two lines on page 375.

THE COURT: I will take a look at it.

Q Following which discussion is testimony with regard to doctors in New Orleans and how many times he saw them, 20 or 30 the first one, Your Honor. I have nothing

further.

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. STEINBERG:

Q Dr. Casarino, assuming that the area Mr. Rathborne is living since 1965 or 1966 underwent a change from desirable or people of substance, assume further that the area where he resided was being acquired by a developer for purposes of constructing a building, assume further that a methadone clinic came into that area and the quality of people changed, would that in any way -- assume also, excuse me -- assume also that some of these people on the methadone cure would be frequenting the hallways of this building, would that, in your opinion, cause the fear complex that Mr. Rathborne had?

MR. JACOBS: Your Honor, I would assume since none of these facts are in evidence, that there will be testimony to that fact.

THE COURT: There will have to be.

MR. JACOBS: Otherwise I would move to strike this entire line.

THE COURT: Do you want to bring him back tomorrow?

MR. JACOBS: I move to strike the question and answer.

MR. STEINBERG: I will show it.

THE COURT: You are to assume the truth of those statements.

THE WITNESS: I would think they would be a factor, you know.

Q Would they be a dorinating factor?

A I think -- I couldn't say that either.

Q It would be a contributing factor?

A A contributing factor.

Q Assume now that Mr. Rathborne occupies two apartments in the building and one apartment the landlord exercises its legal right to evict him or obtain an order from the appropriate administrative agency to evict him and the tenant, Mr. Rathborne, exercises his legal right by opposing that application and the administrative agency grants the application, assume further that he exercises the legal right of protest of the order decontrolling that apartment and that order decontrolling his apartment is upheld, causing him or requiring him to vacate one of his apartments where he allegedly spent money ----

MR. JACOBS: Your Honor ----

Q Would that be a contributing factor towards the condition that he came to see you about, yes or no?

A I don't think I can answer that yes or no.

Q What is your answer to that hypothetical situation?

THE COURT: It's a pretty long argumentative hypothetical question. Ordinarily, Mr. Steinberg, if you are going to ask a physician a hypothetical question, you ought to have it short.

MR. STEINBERG: I'll rephrase it.

THE COURT: Don't rephrase it. I don't have that much time, Mr. Steinberg. I want to ask you if legally he was required to vacate all or portions of his premises, would that cause him to have the condition that he now has?

THE WITNESS: You are suggesting -- you're saying there is another traumatic situation?

THE COURT: That's right.

A I don't think, in my way of thinking, that kind of situation would be as traumatic as the other things you have mentioned. You remember he is feeling very ineffectual totally at the time I saw him. He was totally feeling without any power. I would think if he were working on your premises, he was in the process of fighting this, then he would be coming from a feeling of strength. He was not coming from that way at all.

Q (By Mr. Steinberg) There was an order of decontrol issued prior to the month of June, 1974 when you saw

saw him or October, 1974 ----

MR. JACOBS: Objection.

Q October, 1973, there was an order of decontrol issued prior to that time.

A I saw him in '72.

Q You saw him October 9, 1972?

A Yes. I don't have the date of the order.

THE COURT: Doctor, do you think he was capable of distinguishing between actual harassment and the legal processes of government which required him to vacate and do you think he might assume that even these legal activities were the product of a contrived action on the part of Mr. Garfinkel?

THE WITNESS: I don't think at the time I saw him it would have been. I don't think he was far enough away. He had no floor of delusional system. He had no hallucination; and, the paranoid material was minimal. It's conceivable at a later time it could have gone on, the government is after him and so forth. It was not present then.

MR. STEINBERG: That's all, Judge.

Q (By the Court) Did you say that the change in the neighborhood and the establishment of an Odyssey House in close proximity to this building which treated its residents with methadone, would that have any effect

upon him?

A Only insofar as he perceived it as a threat to him. I don't recall his going into that in anything. And, if it were perceived as a threat, I think it would be one of many he was dealing with.

Q And now the evidence here is somewhat conflicting. For example, various witnesses have testified that there was garbage thrown in the common doorway, and another witness testified that she occupied that same entrance and her testimony was she didn't like the dirt, but she did not attribute the lack of cleanliness to a desire of the owners to get her out, but he did.

A Yes.

Q Is that consistent with what you saw and your examination?

A Yes, consistent insofar as he perceived those things.

Q As a direct threat to him?

A Yes, sir.

Q And a direct attempt on the part of the owner to get rid of him, regardless whether they were so directed?

A I think so, yes.

Q And if other people suffered from the lack of electricity and energy or the turning off of the lights, would his feeling that this was directed towards him and

not directed towards anyone else be consistent with what you found to be the case?

A Well, I believe so. That's what he said.

Q So, it doesn't make any difference whether the owners were really trying to evict him or trying to harass him, he interpreted some of the things that he saw as being an action on the part of the owners to evict him?

A Yes.

THE COURT: All right. Thank you very much.

MR. JACOBS: Mr. Steinberg previously told us that Mr. Garfinkel was going to testify. Today he said something about himself testifying. Before I rest in this case, I want to know. If Mr. Garfinkel is not going to testify, I want to call him as a witness.

MR. STEINBERG: Of course he is going to testify. Oh, sure. I never said that to the Court.

MR. JACOBS: I want to clarify that.

THE COURT: Let's not get into any argument on that. Are you going to rest?

MR. JACOLS: Not quite, Your Honor. With regard to -- you recall in your chambers on Friday, I told Your Honor a man came, Mr. Allen, and found there was tampering with the switch and made the repairs.

ALEXANDER AVOLON

was thereupon produced as a witness in behalf of the defendant, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Please be seated. State your full name and spell your last name.

THE WITNESS: Alexander Avolon, A-v-o-l-o-n.

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MR. STEINBERG:

Q Mr. Avolon, Munchtime, U.S.A., Inc. is a tenant at 873 Third Avenue; is that correct?

A That's correct.

Q When was the lease entered into with respect to that area?

A About eight years ago.

Q Can you give us the date?

A Not exactly, no.

THE COURT: What year would that be, 1966?

THE WITNESS: '66 or '67, I believe it was.

MR. JACOBS: Can't we have the lease, Your Honor.

MR. STEINBERG: I will bring the lease. I don't

have it with me.

THE WITNESS: '67, I think it was.

Q I think it's '66, all right.

A '66.

Q Mr. Avolon, what portion of the building does Munchtime occupy?

A The corner store, ground level.

Q What is the nature of the business?

A It's a fast-food restaurant.

Q Now, do you know the plaintiff, Mr. Rathborne?

A I do.

Q For a period of years prior to '72, what was the relationship between you and Mr. Rathborne?

A Very good.

Q Now, in the course of the construction of the store, did the corporation install an air-conditioning unit on any portion of the building?

A On the roof.

Q Where?

A The roof. It couldn't be above my store because I had no roof.

THE COURT: Wasn't that on the terrace?

A Yes.

THE COURT: That was occupied by Mr. Rathborne?

THE WITNESS: A portion of that part, right.

Q (By Mr. Steinberg) What time of the year is the air-conditioning unit in effect?

A During the summertime.

Q How many months is that?

A Four, five.

Q Now, from the time you installed it until '72, did Mr. Rathborne permit access for purposes of cleaning and effecting necessary repairs?

A Every time.

Q You had no problem with him at all?

A No.

Q Were you friendly with him at that time?

A Yes.

Q And now, sometime in 1972, did you or your corporation or an officer or someone else attempt to effect a repair to the air-conditioning units for use during the summer?

A Before that in '71 we had a repair one time and the men went upstairs and they got on to the roof; Mr. Rathborne wasn't in. They got on to the roof. I guess one of his employees let him in. When he found out about it, he got a shotgun.

MR. JACOBS: Your Honor ----

A He chased the two men off the roof.

MR. JACOBS: Can I find out if he was present?

THE COURT: Were you present?

THE WITNESS: No.

MR. JACOBS: I move to strike his testimony.

THE COURT: He was told that.

THE WITNESS: By the repairmen.

MR. JACOBS: That's hearsay.

THE COURT: That's hearsay.

THE WITNESS: They told me.

THE COURT: He wouldn't let him on. I think he testified to that already.

Q (By Mr. Steinberg) Now, that's in '71; is that correct?

A Right.

Q Did any other incident take place during that year?

THE COURT: I am going to strike the testimony about the gun.

MR. JACOBS: Thank you.

Q Did any other incident take place during 1971?

A No. We became friends again.

Q After that incident?

A Right. He let us go back on and repair.

Q In other words, you made other repairs throughout the year, 1971, to the air-conditioning unit after that incident; is that correct?

A Correct.

Q What happened in 1972 when you attempted to use the

air-conditioning unit?

A We go up to repair it, he wouldn't let us on to the roof. Then I said to him, we wouldn't bother his roof if we can go on from the roof from the hallway; that was constantly locked by Mr. Rathborne. I said, "Please Rat, please leave that open. We wouldn't disturb you. We would go on there and fix whatever had to be done." He wouldn't let us go on. I had to go to the landlord and ask him. I make an appointment in the meantime. I was charged by an hourly rate. The company who sent their men down to do something. It was hot in the store. I go to Mr. Garfinkel. I was frustrated. My employees were sweating in 90-degree heat. We set an appointment with Mr. Garfinkel to come on the roof with me. He would let us in. He would call the police. The police said, "Well, this is a civil matter. You have to go to court." I confronted him many many times about that. He said, "I don't want your business here. I don't like your business."

THE COURT: Who said that?

THE WITNESS: Mr. Rathborne.

Q Mr. Rathborne said, "I don't like your business?"

A Yes. I told him, "Prescott, there are many times I done you a lot of favors." He would ask my employees,

when he had parties if we would take the garbage out. He would ask us not to take the garbage out. I would confront him. I would say, "Look, Pres, why do you do this? My employees stay after hours to do you a favor. Why don't you have humane feelings and let the air conditioner be repaired for their sake."

Q What was the answer?

A He said,"No, you're not going to go on the roof."

Q Were you able to adjust or correct or remedy the condition on the air conditioner on the roof at any time when you attempted to gain access?

A No. For a whole year we could not go up on the roof.

Q Was the air conditioner working?

A No, it was not.

Q That was the year '72; is that correct?

A '72, right.

Q Now, after '72, what, if anything happened between you two?

THE COURT: Wait a minute. He moved out in October, '71?

MR. JACOBS: In November. He moved out November, '72.

THE WITNESS: I repaired it immediately.

Q It is alleged here -- tell us about the electricity,

Mr. Avolon. Where is the switch or the fusebox relating to Mr. Rathborne's apartment?

A Down in my basement.

Q And now Mr. Rathborne said access was denied to him to correct the condition whereby he had no electricity in his apartment for almost a month, right?

A I remember.

Q Tell us about that.

A At that point Mr. Rathborne used to run in and out of the place late at night or his people. I have a cigar inventory downstairs. Everybody used to walk in and out. I said things were stolen and things were missing. I said to my employees, "I don't want anyone coming in here at eleven, twelve or one o'clock in the morning capriciously or to use somebody else's name. If anyone comes in, I want to be here." So, Mr. Rathborne used to come into the place, don't ask the manager's permission, would run downstairs. I said, "Listen, I don't want anyone to come down here."

THE COURT: What did he run downstairs for?

THE WITNESS: To go down to the electric panel box. He was always going down to the panel box.

THE COURT: Is that because his electricity wasn't operating?

THE WITNESS: From what the electrician had told me,

he used to have a lot of air conditioning and a lot of things and the fuse always blew out. Then he complained to me. He said to me, "Look, that damn apartment is always blowing out fuses." So, I would let them down when I was there. Other people would come down. I said, "Pres, if you come down, my employees know you. But other fellows run down the basement, we're busy. We don't know who they are. We have cigarettes in the inventory down there." We said, "If you establish an hour,"then we did that. Actually, we went to court and I said, "If you would call me, I'd make arrangements with my employees, if he specifies who he wants to go down, it was perfectly okay to go down."

Q He first wrote a letter complaining about you to Mr. Steinberg in March, 1971. Had he been complaining as early as that to you?

A He was complaining to me. He used to complain about the garbage. He used to complain about the people who used to come into the store. Then the methadone center came and the neighborhood became inundated. They used to come in my place. I had no power to put them out. He used to call the police. They used to hang around there. He said I attracted those people. I said, "Pres, I didn't attract those people."

Q What about the garbage removal, I don't understand that.

A For the restaurant, you take out the garbage anywhere from 10:00 and they pick it up about two or three in the morning, the sanitation people. We wrap it up in plastic bags and in cartons on the side of the premises. He used to object. He said, "Well, I'm having a party tonight; that doesn't look good." I said, "I know. I'm closing. I can't stay here until 12:00."

Q Mr. Jacobs, do you have those pictures?

A I said, "I have to get rid of the garbage."

THE COURT: Are you complaining about that garbage, Mr. Jacobs?

MR. JACOBS: No, not that. The garbage in the hallway, not the garbage on the outside.

THE WITNESS: This is my own industrial commercial garbage.

MR. JACOBS: We are talking about the garbage in the hallway.

THE WITNESS: I had nothing to do with the hall. I wasn't near his hall.

EXAMINATION

BY THE COURT:

Q Now, did you later refuse to permit him to go down to the fusebox in your basement because he was not permitting you the opportunity to go upstairs?

A No.

Q That didn't make any difference to you?

A I was upset, not for myself, you understand. I am not employed in that store. All my employees are. I felt -- I said, "Look, these are human beings. You say you loved them. You come in and buy ice cream sodas and yet you sit here and watch them sweltering and you still don't give a damn." But, that had no effect. He comes in as a customer. He said, "Are you angry with me?" I said, "I'm not angry with you."

Q Did you complain to Mr. Steinberg and to the owner that you were not permitted to repair your air conditioner?

A Many times, many times. But they tried. They take me upstairs; he wouldn't let us go on the roof. I said, "Look, Sergeant, would you come?" I said, "This is the landlord." He still -- he said, "I can't force you to come on the roof."

Q Who said that?

A The police. I would go with Mr. Garfinkel. He was there. He said, "Look, let this man repair this machine." He wouldn't let us. He would stay in front of us. He said, "You'll have to knock us down if you want to go past us." The cop said, "We can't knock you down. Settle this in court."

Q Did you have any fights with Mr. Rathborne?
A No, no.
Q You got along fine?
A I get along.
Q He wouldn't let you go on his roof but you got along with him fine?
A I have that quality. I get along fine with everybody.
Q How many times did you refuse to permit him to go down to your basement to take a look at the fusebox?
A I never refused myself, my employees -- not him, other people in the building who were not authorized by me or you know, someone else because people would run in and out.
Q Did you ever tell the people from Consolidated Edison they couldn't come in?
A Never. They go in to read the meter every month as long as we knew who they were. As I say, before there were a lot of new characters running around with Mr. Rathborne. Mr. Rathborne had a lot of characters running around.
Q Did you ever dump garbage in his entranceway?
A No, sir.
Q Did either yourself or someone send anyone else to knock down his door or to damage his door?
A No, that was another story that Mr. Rathborne was

putting around that people were throwing garbage. I never seen the garbage. And, he said people would come knocking at his door.

Q Did he tell you that?

A Yes, or the cops came down. In fact, one day I was in my store, the police came down; he came with a few ladies; he was pointing at me. He said, "Is that the man?" He said, "No, I don't know. I don't know." I said, "That man for what? Can I know why I'm being pointed out?" He said, "Well, somebody broke the door down." I said, "Is he accusing me?" He said, "Well, they are looking for the person." I said, "Did I do it?" He said, "Well, I don't know." And they walked away.

Q Did he have some of your employees there?

A Yes, they asked around. No one could say anyone did it. I think he had his secretary and someone else there.

Q Did you ever threaten him by words or motion?

A No, the only -- not a threat. I made him feel like a human being. I said, "It's not right what you're doing." A couple of times at work, it did work for one period, about a year before this. There were times he wouldn't let us on; I would talk to him and talk to him and talk to him. I had a nice gentleman by the name of Cosmo that he liked. He used to stay an extra hour and

take out the garbage. He would go and talk to him. I was in Europe at that time. And, at that time he was alive. Cosmo would go. He was an old man. He would say, "Please, please. We are old." He would let him in. Then all of a sudden, Cosmo passed away. I said, "I guess if Cosmo was still alive, we wouldn't have this problem."

CONTINUED DIRECT EXAMINATION

BY MR. STEINBERG:

Q Mr. Avolon, can you tell us whether you were present when Mr. Rathborne and Mr. Garfinkel had words with respect to axing the door? Where were you at that time?

A What was that?

Q He said a door was axed, broken, hit by an axe. He alleges his door was broken.

A Right.

Q Were you present at any conversation between Mr. Garfinkel and Mr. Rathborne with respect to that incident?

A No, only that when the police came, you know, they went into the liquor store. I followed -- I said, "Listen, this guy is alleging or going around accusing people." So, at that time he was talking with the police. Mr. Garfinkel was and Mr. Rathborne was.

MR. JACOBS: Very briefly.

THE COURT: I am not telling you to be brief. This is an important witness. You don't have to cut it short. You take whatever time you need. I know this man was aggrieved by Mr. Rathborne because of the air conditioner. I want a complete interrogation.

MR. JACOBS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. JACOBS:

Q Mr. Avolon, you say you moved in about eight years ago?

A About '66.

Q What time of the year did you move in?

A The wintertime.

Q Was it the winter of '66 that you moved in?

A '66 going into '67, I believe. I think we signed the lease in December.

Q Do you know where Mr. Rathborne was residing then?

A He was residing there.

Q Do you know if he had the two floors of the apartment at that time?

A I think so, yes.

Q Were you ever told by the landlord he had given Mr. Rathborne the exclusive use of that roof terrace?

A The landlord never told me he gave him the exclusive use.

Q The air-conditioning unit was on his roof terrace?

A Yes.

THE COURT: Whose air conditioner unit?

MR. JACOBS: Mr. Avolon's.

THE WITNESS: Mine.

Q The air conditioner from your store was on Mr. Rathborne's terrace?

A It had to be brought up with a crane. It was a big unit.

Q Was Mr. Rathborne around at the time it was installed?

A Yes, he was.

Q He didn't object, you say?

A No.

Q Did you ask Mr. Garfinkel whether it was all right to install this on Mr. Rathborne's terrace?

A Yes, no problem.

Q He told you there was no problem?

Q (By the Court) Did you have a written lease?

A Oh, sure.

Q Do you have that lease?

A Sure.

Q When you rented this place, did you talk about an air-conditioning system?

A Oh, sure.

Q What agreement was made?

A In the portion of the lease, it specified I could put it on the roof because I had an experience with another landlord. I opened up 54 stores in my business career. I got caught one time without getting a lease, without putting it in. I had to get permission. This was no roof. I had to go through an attorney's office. I had to pay $10,000. That taught me a lesson.

Q Did you ever say to Mr. Rathborne, "Look, you have no business to keep me out because I have a lease."?

A Afterwards, sure. I said, "Look, Pres, for two years we are going up here. Let me go up there. Why didn't you stop me then?" I would have put it on another roof. I pleaded with him, "Why hadn't you opened up your mouth then? If you had, I had obtained the crane. It would have cost me $50 to move it. I would have put it on another roof. That might have saved me $50." The crane had a tremendous boom.

THE COURT: We are going to take a look at that lease.

MR. JACOBS: Thank you, Your Honor.

Q (By Mr. Jacobs) Did Mr. Rathborne ever tell you that he had exclusive use of that roof?

A One time finally we got on the roof with my mechanic,

I pleaded with him. He called the cops. The cops come there. He called Mr. Davis first. I saw the man on the phone. It was a dialogue. He told the people, "Don't let them on there." He took his lease and he showed it to the police. He said, "I have exclusive use of the roof." So the cop said, "There is nothing I can do. This is a matter you have to take up in court." I said, "Okay." We left.

THE COURT: Any further questions, Mr. Jacobs?

MR. JACOBS: Yes, Your Honor.

Q (By Mr. Jacobs) Mr. Avolon, how could you get access to this unit?

A Okay.

THE COURT: You mean after it was installed?

Q Once it was installed?

A To repair?

Q What different ways are there to get access to this roof terrace?

A There were two ways. One was through Mr. Rathborne's apartment, which I didn't like at all because I didn't want to bother him or annoy him. The most easiest way was through the regular means of going up to the roof from the regular stairway, common stairway.

Q Weren't there other roofs right adjoining that you could have walked up from?

A No, unfortunately not unless you were a monkey. There was nothing.

Q What about Mr. Ellengberg's roof?

A Now, Mr. Ellengberg was a nice fellow -- is a nice fellow. Finally he let me go through. But then he would jump on the roof and say, "This is my roof."

Q So, you gained access?

A I could get access.

Q You gained access to Mr. Rathborne's roof terrace by going through someone else's apartment?

A In desperation.

Q How many times did you do that?

A Twice we give up. We knew it was going to be a confrontation. We said, "Forget it. It's not worth it."

Q How many confrontations were there?

A Twice; and, I was afraid we were going to have another gun episode. So we said to the fellows, "Look, it was getting hot and heavy." I said, "Let's go."

Q You said there is something in your lease that gives you the right to use it, correct?

A Correct.

Q You were losing business, weren't you, because of this?

A That's right.

Q Your food was spoiling?

A Yes.

Q Did you ever go and scream and rant to your landlord about it?

A Well unfortunately, I didn't. Unfortunately, I didn't. In a sense, you would have an enery. At this time I found out there was an assemblage. I didn't want to get in any argument with my landlord. I said to him, "Look, I have to fix this thing over here. It's incumbent upon you to help me." His attorney would call many times to Mr. Rathborne to let him go in and make the repairs on the roof and to let us go in. He said, "Look, it's going to take at least two or three weeks.

Q Who said that?

A Mr. Garfinkel. Mr. Garfinkel would say, "It will take a few weeks." I would say, "All right." I knew it was starting legal action. I knew it was a costly thing, which I didn't want to get involved in. I said, "Okay." Before you knew it, the summer was over.

Q The whole summer passed and you didn't have use of it?

A I talked to -- I knew how much it would cost. I talked to my attorney about how much it would cost to start a legal action. He said, "Somewhere in the area of $2,000." I thought that was something I didn't want to spend.

Q Did you ever contemplate moving the air-conditioning

unit?

A I pleaded. It was an expensive job. This is on steel. It's a big unit. That's what I couldn't understand, why Mr. Rathborne had let us go on the roof originally for so many years and all of a sudden cut us off.

Q You mentioned a minute ago you didn't want to start anything with the landlord because of the asserblage. What did you mean by that?

A It was only a matter of a few more years they were going to buy us all out, five years or so. I said, "Then he was going to take care of it." The lawyers was actively working trying to help remedy the situation. One week, two weeks and the summer went by. So finally we had gotten on the roof a couple of times. They were helpful to get it fixed temporarily.

THE COURT: Who is "they"?

THE WITNESS: The landlord.

Q What did he do to help you get on the roof?

A Through Mr. Ellengberg's apartment. So, I appreciated his effort. I knew it wasn't something that he had turned against me.

MR. JACOBS: No further questions.

THE COURT: That's all.

MR. STEINBERG: Just a few more questions.

DORRIE ROSENBLATT

was thereupon produced as a witness in behalf of the plaintiff, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Please be seated. State your name and spell your last name.

THE WITNESS: Dorrie Rosenblatt, R-o-s-e-n-b-l-a-t-t.

THE CLERK: Dorrie Rosenblatt.

EXAMINATION

BY THE COURT:

Q What is your occupation?

A Horticultural consultant.

Q Did you look at Mr. Rathborne's terrace?

A Yes.

Q Did you examine each and every plant he had there?

A Not each and every plant.

Q You looked at the plants?

A Yes.

Q When did you see his garden?

A I saw it in June, 197? and also another time in the summer, August.

Q Are those the kind of plants with which you are

acquainted?

A Yes.

Q How long have you been in this business?

A Since 1965.

Q Do you keep abreast of the cost of this type of installation?

A Well, I have some idea; but I'm more of a horticultural consultant. I was quite impressed with the plants themselves, the type of species.

Q Were they rare species?

A Yes, in some cases, they were, but also many of them were very beautiful.

Q Were they the type of plants that could be moved?

A Not easily.

MR. STEINBERG: I didn't hear that answer.

THE COURT: Not easily. Do you have an opinion as to the fair market value of those plants in the fall of 1972?

THE WITNESS: I don't have exact figures on them. I do feel though that it was extremely valuable. I mean I can't really, you know, can't give a monetary figure on it.

Q (By the Court) You can't give a monetary figure?

MR. JACOBS: Your Honor, there is a witness who will give a monetary figure.

THE COURT: All right. Is that all you want from this witness?

MR. JACOBS: Well, I would like to show her Exhibit 37.

THE COURT: She knows what it is.

MR. JACOBS: I would like to have her identify this.

THE COURT: Is that a reproduction?

THE WITNESS: Yes.

THE COURT: Okay. That's all.

DIRECT EXAMINATION

BY MR. JACOBS:

Q How many roof gardens have you seen in the past?

A Well, I have seen quite a number.

Q Fifty or 100?

A Fifty or a hundred.

Q Out of that many, could you tell us how many compares to this one that Mr. Rathborne had?

A Maybe two or three. Others that I have seen specifically, I remember several, one of those was Mr. Rathborne's garden.

Q Do you feel there was a lot of work and time that went into it?

A Absolutely.

MR. JACOBS: Thank you.

JOHN MAYER

was thereupon produced as a witness in behalf of the plaintiff, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Please be seated. State your full name and spell your last name.

THE WITNESS: John Mayer, M-a-y-e-r.

EXAMINATION

BY THE COURT:

Q What do you do for a living?

A I'm a professional horticulturalist. I have the Gardening Outdoors Garden concern at the city garden in New York City. I do terrace gardens.

Q For private industry?

A Yes.

Q Do you install them for pay?

A Yes.

Q They buy them from you?

A Sometimes.

Q Do you know the prices of the various plants?

A I am familiar with outdoor materials.

Q Have you, at Mr. Rathborne's request, taken a look at that garden of his?

MR. JACOBS: Your Honor, he has never seen the garden.

THE COURT: He hasn't seen it?

MR. JACOBS: Your Honor, at the eleventh hour, he was the only one we could produce. He can testify as to Mr. Rathborne's description of the garden. Mrs. Rosenblatt can describe the garden and what was incorporated in the garden. He can testify as to that.

THE WITNESS: Excuse me, I saw pictures of it. And, I was just shown a list of the plant materials in there and was asked to look at the price of the plant materials. I thought this was fair.

Q Have you got a list of the plant materials?

MR. STEINBERG: Your Honor, this is a very unusual way of proving value.

THE COURT: I don't think it is. He is going to give an expert opinion based upon the truth of what he regards to be the contents. It may very well be it is not in there. They will have to establish what material is in there.

Did you look at the material in the garden?

A I have looked at that list.

Q You looked at the design in the picture?

A Yes.

Q In your opinion, was it reasonable to believe that these various species was in that area which you saw in the picture?

A Yes. It's a very huge garden.

Q What, in your opinion, was a reasonable value for the material that you saw there in the fall of 1972?

A Well, I can't memorize what was on that list. There was a total on that list. I was just comparing price for specific items. They would give the measurement size of the plant.

Q In other words, you looked at that list and saw the prices that were put in by Mr. Rathborne?

A Well, whoever compiled that list; and, my opinion, because I do buying for my concern, I am familiar with these prices. I would say those are correct prices for the material listed.

Q You don't know who priced them?

A No.

THE COURT: Maybe we can find out who priced them. Who did price them?

MR. JACOBS: Your Honor, what happened was it was priced by another gardening expert who is in Thailand now. We could not produce him. He produced this report. What I suggest, Your Honor, I think we can tie in Mrs. Rosenblatt with this report. She can

testify whether these various things were in the garden if you wish.

THE COURT: Mr. Steinberg doesn't care about that. Have you seen that list, Mr. Steinberg? It is a big garden. If you want Mrs. Rosenblatt to testify she saw these various species, I will be glad to do it.

MR. STEINBERG: Judge, you permitted me such liberality in this case, I think one more paper isn't going to make much difference. I would reserve the right to strike this. This is not the proper type of evidence.

THE COURT: I have plenty of time now. If you want to come in at 7:00 in the morning, I will be glad to hear you. You don't have to worry about that. She can get on the stand and go through these various items and say she saw them in the garden. That is perfectly all right with me.

MR. STEINBERG: Judge, I don't mean to imply that at all. I make a blanket objection about the expert testimony under the rules of evidence.

THE COURT: What is your point?

MR. STEINBERG: My point is this: This is all speculative. It is not pure expert opinion.

THE COURT: Mr. Steinberg, on that basis your

objection is overruled because there is no merit in your contention. If you want to stipulate that she will so testify, all right. If you don't want to stipulate, we will bring her back and have her testify.

MR. STEINBERG: I am not going to obstruct this thing at all. I told you a moment ago you have been rather liberal in this matter. One more paper isn't going to make that much difference.

THE COURT: Go ahead. What is the total amount?

MR. JACOBS: $39,691.

THE COURT: Is that the amount you saw?

THE WITNESS: No, there were various amounts on there. One was for plant material; the others were for various other items.

THE COURT: He is only talking about the plants. What does the plant material show?

MR. JACOBS: I could hand this to the witness.

THE COURT: Tell me what you thought the value of the plant material is?

THE WITNESS: This isn't just for plant material. Here is the $39,000 figure. I can only vouch for the price of the plant material. Insecticide maintenance cost and that all is correct. As far as the itemized list of plant material, that would come to $5,600 is in my opinion the approximate cost of this material.

He had established this garden. That is a big difference between materials bought and newly installed as opposed to a garden that's been in existence for five years.

THE COURT: That is more valuable?

THE WITNESS: Obviously because there is always a death rate among plants.

Q (By the Court) Do you know what the reasonable value of those plants was?

A I would say if this is an original plant figure, $5,600, to replace those plants by today's cost would increase about at least a third. And, the aesthetic value of an established plant as opposed to a newly planted one, I couldn't give you the exact price, it would -- you couldn't buy a list. It would be more than twice the value. It would have to be.

Q About $12,500?

A Just in plant material, yes.

Q What else is there?

A Well, you have boxes; you have soil; you have maintenance. You plant the garden, someone has to make sure there is no infestation; make sure the plants are watered with proper moisture.

Q Would that determine the value as on a specific date?

A Well, depending on how much money had been invested in

the garden, certainly.

THE COURT: Any further questions? Are you finished, Mr. Jacobs?

MR. JACOBS: I would like to clear this up.

DIRECT EXAMINATION

BY MR. JACOBS:

Q Could you estimate, having seen the plants that were there, the fact the garden was built up over a period of approximately years, could you estimate how many hours would have been taken to keep up the garden and maintain it?

A It would be impossible for me with the information I have.

Q What further information would you need?

A I would need to know how many men worked.

Q One man.

A I would have to know how often he worked.

Q I am talking about hours. I am thinking of how many hours, man hours would it take to put in this garden and maintain it?

A Thousands. It's a massive undertaking.

Q I show you Exhibit 37 and ask you, looking at that exhibit, having seen what was put into the garden, could you estimate what gardens such as this would be worth?

A I would say a garden of this scale, starting out with nothing, would cost in excess of $100,000 to install.

Q That would include, of course, all the hours that were spent, assuming that someone else was working for pay for that?

MR. STEINBERG: Judge, the questions are all suggestive and leading.

MR. JACOBS: I want to clear the record.

MR. STEINBERG: You may want to clear the record, counsel; I still object to the question.

THE COURT: He is asking for the reasonable value, regardless of whether they paid for it or not; isn't that it?

THE WITNESS: Looking at this, if you came to my firm with this and asked for an estimate on this, of course, I would have to work up an elaborate figure. Just looking at this, the labor, material and what have you, would cost, without a doubt, more than $100,000.

Q Of that hundred thousand dollar figure, how much would you say is labor; how much is material and how much out-of-pocket cost?

A The cost of the plant material, per se, is probably one of your lowest costs.

Q Out of the $100,000 you have given us.

A Maybe $10,000.

these boxes were connected together. You can't move these things easily.

Q Now, suppose this tenant moved in in 1965 and put the boxes there at that time, what would the cost of purchasing those plants at that time be?

A I don't know what the prices were in '65.

Q How did you arrive at the figure of $100,000 then?

A Just by looking at the size of this undertaking.

Q Do you know what size it is?

A I have been told. I can see by the number of feet of boxes, which were 200 something that it's a huge undertaking.

Q How many boxes did you say there were?

A I don't know the number of boxes. I believe it was 200 or something linear feet of boxes which surrounded this terrace.

Q If they were installed in 1965, what would you say the cost was at that time?

A I don't know.

Q How much does a box cost?

A Five-foot redwood box might cost $200, just the box.

Q Do you know whether it is permissible under the code to put plants of that type on a roof of a building?

A That has to be taken up with the landlord of the building.

Q I didn't ask you that. Do you know whether there is any prohibition in the administrative code which prevents the installation of plants of that type on that roof? Do you know?

A This particular roof, I don't know.

Q Is it permissible, based upon your experience in this business, is it permissible to install plants of that type on roofs of buildings?

A I have taken care of hundreds of them.

Q On roofs?

A On roofs.

Q What size?

THE COURT: Mr. Steinberg, I will give you the name of the wife of a judge who has one right close by which is almost as big as this.

MR. STEINBERG: I have seen them myself, Judge. I don't want to get into a discussion. I am told we were compelled to remove them.

THE COURT: If you want to come in with a witness to say this was illegal, you may do that.

MR. STEINBERG: That is all, Judge.

THE COURT: I am going to take a recess now. Are you going to bring in any exhibits, Mr. Steinberg?

MR. STEINBERG: If you want the lease, I will go back to my office and get it.

MORNING SESSION

October 22, 1974
10:00 a.m.

THE COURT: Mr. Steinberg, call your first witness.

MR. STEINBERG: Call Mr. Vitola.

JOE VITOLA

was thereupon produced as a witness in behalf of the defendant, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Spell your last name, please.

THE WITNESS: V-i-t-o-l-a.

THE COURT: What is this witness going to testify to?

MR. STEINBERG: About the lock.

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MR. STEINBERG:

Q Have I ever seen you before?

A No.

Q This is the first time?

A Yes.

Q Have I discussed this case with you prior to this day?
A No.
Q I just met you a few moments ago?
A As soon as I walked in.
Q What is your occupation?
A Locksmith.
Q Where do you work? By whom are you employed?
A Myself.
Q Where is your business?
A 202 East [illegible].
Q Do you know Mr. Garfinkel?
A Yes.
Q How long have you known him?
A Fifteen years.
Q In the course of your operation of your business, have you had occasion to do any work at 873 Third Avenue Corporation?
A Quite a few times.
Q Where else?
A 202 East 253rd, a liquor store.
Q What is the nature of the work you performed?
A Lock repair, new locks.
Q For how long a period of time have you been effecting repairs on the subject building?
A The past eighteen months.

Q Prior to that time, have you done any work for Mr. Garfinkel, prior to the eighteen-month period?
A Yes.
Q In other words, have you done work in this building on and off many years?
A Fifteen years.
THE COURT: What building are you talking about?
A 200 East 53rd, a liquor store on Third Avenue.
THE COURT: Do you know Mr. Rathborne?
THE WITNESS: I have seen him.
Q (By Mr. Steinberg) Do you know where he lives?
A Used to live in the building.
Q Do you know what entrance he had?
A 200.
Q Have you ever seen Mr. Rathborne walk the streets without shoes?
A Once, I believe.
Q Have you ever seen him carry a gun in the streets?
A Yes.
Q Have you ever had any discussions with him?
A No, not really.
MR. STEINBERG: That's all. In other words, you have been maintaining the building.

EXAMINATION

BY THE COURT:

Q Was there a period of some months that the lock didn't work on the 200 entrance?

A Not for months. I put a new lock on that one day and went up and put another one in the following day.

Q Were you acquainted with any period of time when the lock wasn't working for weeks at a time?

A Not that I know of.

Q Did you have anything to do with the buzzer syster?

A No.

Q You don't know anything about the buzzer system?

A No.

THE COURT: Go ahead.

Q (By Mr. Steinberg) In your opinion and to your knowledge, based upon your work in the building, has the lock in this building ever been out of control for a period of weeks?

A Not that I know of, no.

Q What, to your best recollection -- how long a period of time was the lock not functioning?

A Possibly one day at the most.

Q What was that due to?

A I had to order a new lock. I put that in a few months back.

Q Just a minute. One other thing about the garbage. With regard to the cleaning of the building and the sidewalk, can you tell the Court whether or not the sidewalk has been swept regularly by Mr. Garfinkel or Mr. Garfinkel's representatives?

A Yes, it has.

Q Have you had occasion to be in the subject building and inspect the garbage in the hall? Have you ever seen garbage strewn all over the floor?

A I find coffee containers around.

Q Since the neighborhood changed, has that been taking place regularly in the area?

A Yes.

THE COURT: What do you mean, it is not as dirty now?

THE WITNESS: It's not like it was ten years ago, let's put it that way. All kinds of characters hang around there. They're killing business and everything else. I come in and I find it in front of my place, coffee containers that are thrown up on the stairs and Mike cleans that place up three and four times a week.

Q What is that due to?

A From the way I figure, the methadone center, they hang around from there.

Q How long have they been there?
A As far as I know, a couple of years.
Q Since they came around, have you found ----
THE COURT: Let's go to something else.
MR. STEINBERG: That's all I have.
THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. JACOBS:

Q Mr. Vitola, did you regularly go to check the lock or did you repair locks when Mr. Garfinkel asked you to?
A When Garfinkel asked me, I fixed them.
MR. JACOBS: No further questions.

REDIRECT EXAMINATION

BY MR. STEINBERG:

Q Have you ever had any argument between you and Mr. Rathborne?
A No.
Q Have you ever struck Mr. Rathborne?
A No.
THE COURT: There is no contention about that.
MR. STEINBERG: Thank you.
THE COURT: You can go home. We are getting a lot of useless witnesses. I don't think there is any contention that the lock was broken for a long

MAX STEINBERG

was thereupon produced as a witness in behalf of the defendant, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Please be seated.

THE WITNESS: My name is Max Steinberg. My home is 75 Park.

THE COURT: We know you are the lawyer for the defendant.

THE WITNESS: I have been the attorney for the defendant for almost 15 or 18 years. I am the one who represented the corporation in the Rent Commission wherein prior tenants were evicted pursuant to Section 57 of the rent and eviction regulations.

THE COURT: Can you tell me what Section 57 provides?

THE WITNESS: Where a landlord seeks to subdivide an apartment, he must comply with such rules of the Rent Commission by filing an application; by filing a proof plan showing financial responsibility and the ability to relocate tenants if necessary and pay them the stipend if they want to

get out.

THE COURT: I will find it much more productive if I were to ask some questions.

THE WITNESS: Yes.

EXAMINATION

BY THE COURT:

Q You handed me a form of lease dated February 14, 1966 between 873 Third Avenue Corporation and Little Snacks, Inc.; is that the outfit which is run by the man who testified yesterday?

A Yes, Your Honor.

Q What is his name?

A Mr. Avolon.

Q This was the lease for ----

A The store on the corner of 53rd Street and Third Avenue.

Q For the period from September, 1966 through 1993?

A That's right, sir.

Q The lease of Mr. Rathborne's was dated December 22, 1965. And, there is another one dated June 2, 1966.

A Right, sir.

Q Now, do you recall when Mr. Rathborne moved into his apartment?

A I can't tell you, not physically.

Q Did you prepare the lease?

A I prepared the lease, yes, I did.

Q Was there any discussions orally concerning the use of the terrace?

A Mr. Garfinkel under my instructions had all the conversations with the tenant.

Q All right.

A I had none regarding the terms of the conditions of the contract.

Q When was the first time you had any conversations with Mr. Rathborne concerning the tenancy?

A Judge, there were complaints. I think the second lease, if you permit me to look at what I just gave you this morning, that folder, there is some lists. I think the one he gave us -- gave Mr. Garfinkel saying he wanted some work done in the second apartment.

Q Insofar as this portion, you can tell us in your own words what you were going to say, leaving out everything other than what is really germane to this case.

A Mr. Rathborne and I had what I termed a very uncertain relationship. He was hot and he was cold at me. One day he would call me, "Max, my friend." The next day he would abuse me. It was my function to help Mr. Garfinkel run the building in accordance with the rent and eviction regulations and to keep him out of

trouble. I filed the Rent Commission form at the time we leased the space to Mr. Rathborne. When problems arose that Mr. Garfinkel couldn't handle, he would call me. I would call Rathborne on the phone. I would talk to him and talk to him and talk to him. I would go to visit him on many occasions. I said to him, "Prescott, what's the fight about now? What is it you want? Show it to me." I made the inspection of the apartment in order to satisfy him. But apparently, we never could. This was always resulting in these various little disputes that occurred.

Now, there are times when he didn't pay the rent. I sued him. He would pay. There was one occasion when we had a very serious situation where we started a proceeding in a criminal court. He was represented by an attorney. And, there is a document here that he signed wherein he agreed to get out. It is dated February 10, 1967. But knowing him being so unpredictable, I told Mr. Garfinkel to forget it, let him stay. Nothing has been going right for a period of time he has been a tenant. He was never satisfied. I couldn't satisfy him either. Yet, as I say, we were friendly at times. I said to him, "You're a Southern bigot. You don't understand how we do things up North." I said, "You're irritating."

I tell you this, Judge, the thing that hurts me most in this case is in this examination that I conducted of Mr. Rathborne, he used language -- forgive me Judge.

THE COURT: I know you are an excitable man.

THE WITNESS: I am not excitable. I am irritated to think -- you will never find me using a four-letter word. Nobody can ever say I have used a four-letter word.

Q (By the Court) I read those words.

A I never used the other words. I wouldn't use it in front of you or anybody else. That's the thing that irritates me in this situation. That's why I'm very very indignant and angry about the thing. It's my character.

I will state what happened on the fire department incident with Captain Henson. Mr. Garfinkel called me up and said, "The fire department is making a routine inspection of the building. Rathborne will not let them open the door to the roof." I took a cab up to the place. I met him, and there was Captain Henson, Mr. Garfinkel and myself. I said, "Rathborne, the Captain wants you to unbolt that lock." He said, "I won't do it." I said, "Rathborne, we are going to get a summons." He said, "I won't do this. This is my roof." We got the

summons, got the violation. I called Mr. Bradley Davis and I went to court, 346 Broadway. I told the judge the story. I brought him in on the summons that we got. Mr. Davis and I went to court; Mr. Davis raised a point under the administrative code that that lock could be there. Be that as it may, we paid a $25 fine.

THE COURT: Who paid it?

A 873 Corporation. We paid it. I have the receipt.

Q Because you had the lock there?

A Because his lock was there, not our lock. He wouldn't move his lock. He said, "It's my lock. I won't take it off my roof."

Q He has two leases here. At least one says he has exclusive right to the roof.

A To the roof, Judge, right. That means he could use the roof. He can't put anything on it. There is nothing in that lease that says he could put things on it. That's the point.

Q What things are you talking about?

A He put floor plants on there. We got notices. I personally got notices from the inspector of the Department of Buildings who said we have got to remove these plants. He said we were in violation of the law and that this would stop-up the gutters.

THE COURT: You gave another man a lease which permits him to use the roof too?

A Right, before.

Q to put the air-conditioning unit there?

A Right. Let me explain that to you, Judge. Before I made the lease, we negotiated with Mr. Avolon. I sent Mr. Garfinkel over to see Mr. Rathborne. I said to him, "Sol, you tell Prescott that we are making a lease or a proposed lease for the tenant downstairs for a stand-up restaurant. He has a right to use it. Let him give his permission orally because I knew he wouldn't give it in writing to let the man put an air-conditioning unit on that roof because we have exclusive use for him. He has no right to put anything on the roof. He is a troublesome fellow. Let's avoid it." Mr. Garfinkel will tell you he was there at the time the air-conditioning unit was installed. For a period of three years, he did nothing. He didn't complain about it. He didn't write a letter of complaint to me.

Q All right.

A We knew about that clause. I took pains to see we got a waiver orally from Mr. Rathborne.

MR. JACOBS: Your Honor, I understand he is saying

there was an oral waiver.

THE WITNESS: Yes, by Mr. Rathborne.

THE COURT: Not with him.

THE WITNESS: With Mr. Garfinkel.

Q (By the Court) Let me ask you about the times these witnesses testified to that they tendered rent and your client wouldn't accept it.

A Judge, where you serve a notice of default in a lease under Section 52 and 53 of the rent eviction regulations which I will read to you, you cannot accept the rent. That's the reason I instructed Mr. Garfinkel not to accept it.

Q All right. I want to know about that. I asked that question myself.

Were you in the judge's chambers ----

A Yes, Judge Wahl's chambers. Let me tell you about that.

Q Yes.

A Judge Wahl and I have known each other for thirty years. When we got this matter, I said to him, "Judge, we owe the money. We are going to settle it." We drew an agreement orally on the record and confirmed it by stipulation giving him credit on the rent.

Mr. Rathborne had Mrs. Allen there. Mr. Rathborne passed some official remark. Mr. Garfinkel was short-fused with regard to that. He berated him.

Mr. Garfinkel knows nothing about [illegible]. He heard it. He talked to people. I'm the one who is familiar with it. We are obligated to another person who is a participant in our lease that in negotiations regarding this building must be done with their consent.

An attorney, Mr. Winegold and myself were called to the office of Mr. Glickman and discussion was had about a surrounding cancellation long after he moved out, long afterwards.

Q I think we are getting far afield.

A But Judge, they said one of the things was this valuable property and that we could get a million dollars for it. I tell you now officially, we have never never received an offer, a genuine offer from the owners of the property.

Q I am not interested in that. Do you know anything about the garbage being in Mr. Rathborne's entranceway?

A Judge, I heard that. That is my complete knowledge of the situation. I know nothing about whether garbage was there or whether his door was axed. I heard that.

Q So, you don't know anything about that?

A I do not.

Q Do you know whether the premises which he occupied have been rerented?

A Judge, I have the lease. We rented one in December --

December, 1972, I think it was, for $300 a month.

Q What about the other one, how much did you rent it for?

A What is it, Sol?

MR. GARFINKEL: One is for $300 and one is for $325. The girls will be here soon. The two tenants will be here.

THE WITNESS: Judge, we have rent regulations. We have rent stabilization. We just have to be careful about that.

Q Did you hear any conversation where Mr. Garfinkel threatened Mr. Rathborne on any other time other than the one alleged in the judge's chambers?

A The answer is no except, permit me to say this: Every time I went up to see Mr. Rathborne myself, I never would take Mr. Garfinkel because I knew he would insult me. I would get back at him and Mr. Garfinkel would join to take my part. So I said, "Look, Sol, you stay away. I will go up myself." What they had between them, I was not present except in court when he had a short fuse about some remark. He provoked it. That's what he does.

Q Mr. Rathborne apparently conducted a business operation in at least one of the two apartments?

A Right.

Q Do you have a restriction in the lease against that?

A It's a residential apartment. Look at the lease. Both of them are residential.

Q Does that prevent a person from carrying on the minimal activity which Mr. Rathborne apparently conducted?

A It's a violation of the lease. Not only a violation of the lease, but a violation of the C.O., certificate of occupancy. You can't do it. Judge, we got violations on it. That's one of the reasons. If you look at the record, you will find that I served him with a notice that he is using it for business instead of residential purposes. I gave him the notice. I gave him the ten-day notice. I gave him the thirty-day notice. That is a form of harassment he says. He says that's how we harassed him with the violations. He refused to discontinue. I had to serve him with the notice.

Q Did he ever correct it?

A Sure did. I wrote him a letter to restore the stove and refrigerator to the apartment. I got a letter from Mr. Davis to that effect.

Q He had taken the stove and refrigerator out?

A Of course.

Q What about the people he had? He had as many as five

employees?

A That's a concession of a violation of the lease; although Mr. Davis wrote me a letter that he is not doing any commercial business.

By the way, for your information, Your Honor, to show the relationship between the parties is not as pictured by Mr. Rathborne, he took a lease of office number one. He said we forced him to. I have a letter from his attorney, Robert E. Penn, that he says he is willing to take the lease.

Q What else do you want to say?

A The decontrol, let me explain that to you.

Q All right.

A Under Section 18, which I gave you the brief of the rent regulation where you have two parties and one is the primary, you have a right, because of the shortage of apartments to institute a proceeding before the Rent Commission to eviction or decontrol of the other apartment. That irritated him. He hired Mr. Davis to resist it.

Under the rent regulations, you fi they don't have to have an inspection. They can take it on the papers. They do. They inspect when they deem it necessary. The examiner gets the paper. The examiner makes the determination. If you don't like it, you have

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33 days to protest it, I think under Section 101. That decision of the rent administrator, per se must be reviewed or could be reviewed or may be reviewed under Section 102 of the rent regulations only in the Supreme Court by an Article 78 proceeding.

Q Did they do that?

A They did not.

Q Is there anything else you want to say? Otherwise I'm going to ask Mr. Jacobs to proceed with the cross-exarination.

A No.

THE COURT: Mr. Jacobs.

MR. JACOBS: Thank you, Your Honor. Your Honor, could I have the three leases in question?

THE COURT: Yes. I am going to ask you to just sit down or stand up where you are.

MR. JACOBS: I will.

CROSS-EXAMINATION

BY MR. JACOBS:

Q Now, Mr. Steinberg, with regard to the use of the socalled roof terrace, which is depicted on Exhibit 37 where the air-conditioning unit was, do you recall whether Mr. Rathborne had the use of that terrace first or Munchtime had the use?

A Well obviously Mr. Rathborne had a lease, I think in

'65. If you let me look at it, I can tell.

THE COURT: I think that's true. Go ahead.

Q Mr. Rathborne had a lease of what apartment in 1965?

A I don't know. Give me the lease, I will tell you.

Q Here are the two leases. One lease is for December. That apartment is Apartment 5, is it not?

A There is nothing in Apartment 5 lease that gives him a right to use the roof.

Q So, did Mr. Rathborne have the use of the roof at the time you entered into this lease with Munchtime?

A Under lease dated June 2, 1966, effective June 1, '66, Mr. Rathborne was given the privilege of using -- the word "improvement" I don't know -- "improving the roof extension located ----

Q My question is: On February 14, 1966 when you entered into a lease with Munchtime, did Mr. Rathborne have rights to the roof terrace?

A February 14, 1966?

Q Did he have use of the roof terrace?

A The answer is no.

Q You testified a few minutes ago that Mr. Rathborne gave permission orally for Munchtime to use that roof.

A I also told you Mr. Garfinkel had been negotiating with Mr. Avolon for a long time; and, one of the conditions, as he testified to yesterday, was that he

A Yes.

Q Is there anything in that lease that excludes his use with regard to the Munchtime air conditioning?

A I don't get the question.

Q Munchtime already had a right to use that roof; is that right?

A No. It became effective -- may I see the Munchtime lease? It became effective six months later.

THE COURT: I can read the lease just as well. I know what the legal implications are.

MR. JACOBS: Thank you, Your Honor.

THE COURT: Go to something else.

Q Could I again have lease four on another point? (handed)

Now, with regard to Apartment No. 4, did you bring a proceeding with regard to that apartment that Mr. Rathborne was using it for business purposes?

A When?

Q At any time?

A No. I wrote him a letter when we got the violation notice from the City of New York. I'm talking from memory. I have to look at the file. We got a notice there was an illegal use of that apartment. I gave him a notice under the rent and eviction regulations.

Q Did you also notify him it was a violation of the lease?

A I believe I did. You have the form.
Q I would call your attention to the lease for Apartment No. 4 and I also call your attention to a rider, additional provisions under contract dated June 2, 1966, and No. 3 and ask you if that gave Mr. Rathborne the right to use the apartment for business purposes?
A Mr. Jacobs, whatever it says on it, I will abide by that. Let me point something else out to you that you don't know.
Q Are you going to answer the question?
A Yes. Whatever is in there, we are bound by it. Permit me to enlighten you and the Court also. If you look under Paragraph 9, certificate of occupancy, no landlord can give a right to a tenant to violate a certificate of occupancy. He wanted the right to do it, he got away with it up to a certain point. That's the way the real estate people operate. If you don't -- if it isn't a substantial violation where it creates a fire hazard, they let you get away with it.
Q Mr. Steinberg, when you drew up this lease, did you tell Mr. Rathborne it was a violation to use it for business purposes?
A I never told him that.
Q You knew it was?
A I knew nothing about it. We had checked our C.O. and

that was the point of issue of the whole thing whether he could use it. If you have one person working for you, it's different where he had typewriters, he had people coming in to see him, that is a business occupation. That's a gainful occupation.

THE COURT: What number are you asking him about?

MR. JACOBS: If I can show Your Honor. I think, it's No. 3.

THE COURT: All right.

Q (By Mr. Jacobs) Did you give him the use to use for business or whatever use required?

A No, no, no.

THE COURT: To use the apartment as business use as may be required.

Q (By Mr. Jacobs) Is that limited in any manner?

A Sure.

Q What respect?

A Not in violation, sir.

THE COURT: Don't argue with him on the law.

MR. JACOBS: Yes, Your Honor.

Could I have Exhibits 42 and 43?

(Exhibits handed to counsel.)

Mr. Steinberg, do you recall whether there was any agreement between Mr. Garfinkel and Mr. Rathborne to install any air conditioning at

Mr. Garfinkel's expense in either apartment 4 or 5?

A I wouldn't know, I wouldn't know of any agreement except what the lease provides.

Q Do you know if any air conditioning ----

A I don't know. Whatever was found in the apartment after he moved out was there. I don't know any private agreements made which modifies the lease. Whatever Mr. Garfinkel does with Mr. Rathborne outside of my office, I wouldn't know.

Q When you filed for fixing of maximum rents, do you get the information from your client as to what is in the apartment?

A No. All you do in filing an application for maximum rent is take the maximum rent in the office or rent control and add the 15 per cent under then applicable regulations and file it with the Rent Commission. If they approve, that's the maximum. If they disapprove, they will tell you what the rent should be.

Q You notify the Rent Commission of what the various services are and various appliances are, don't you?

A You tell them you give them heat, hot water and one has a refrigerator, a stove. Look on the back of the form, you will see.

Q I show you Exhibits 42 and 43, did you have anything to do with these forms?

A Yes, I did. This is typed up by the office of Rent Control. I had nothing to do with this. This is based upon application filed with the Office of Rent Control. They fixed the rent at $250, which we charged.

Q The material on the back, who fills this out?

A This is filled out by the Office of Rent Control.

Q Who tells the Office of Rent Control these things?

A The records are kept back to 1943 when the Rent Control became effective. I had nothing to do with that. This binds the landlord.

THE COURT: He has already testified. Do you want to bring somebody to show he gave the information? He says he didn't.

Q I ask, have you ever seen these forms before?

A Yes. Mr. Jacobs, let me enlighten you again. What is printed on the back here is taken from the records of the rent commission filed by fee owners in 1943 and '44 when the law became effective. The landlord has nothing to do with the back of this or the front of it. That's strictly Rent Commission order.

Q Mr. Steinberg, you have testified with regard to the rent overcharge. You told Judge Wahl, "We owe them money." Is that correct?

A Yes. Let me explain.

MR. JACOBS: Your Honor, could I get some questions

answered without explanation?

A It was a summary judgment. We said, "We are willing to pay."

Q What rent was Mr. Rathborne paying?

A Two hundred seventy-five; I think 275 or 300; I don't remember.

Q The overcharge was found to be 75 a month, wasn't it? Answer the question.

A The answer is "Yes."

Q The overcharge was $75 a month?

A Yes.

Q Which means he was paying 575?

A Whatever it is, yes.

Q How did he come about he paid 575?

A Let me tell you about that. I had a preliminary discussion with Mr. Rathborne about that. I said, "Look, Prescott; taxes in this building have gone up considerably. The area is beginning to improve because Third Avenue and 53rd Street is a hot area. I know from my own office experience what is going to happen around some areas of that location." I said, "Why don't you and Sol sit down and talk about it." Thereafter, Mr. Garfinkel called me up and said, "I made a deal with Prescott to get an increase." I said, "Sol, whatever you do, be very careful. You're

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charging an excess rent." He said Prescott promised me he would do nothing about it. And, based upon Mr. Rathborne's representation -- I advised Mr. Garfinkel not to do it. I told him, "You would be exposed to it." I don't permit clients to take more than the maximum rent. I indicated to you and to the Judge, my clients have no trouble with the Rent Commission.

THE COURT: All right.

A Based upon that, we took more rent. And, when some of this area started, when Mr. Davis got into this matter, our trouble started. Sure, I resisted the summary judgment based upon what I thought were valid legal grounds. My judgment was wrong. We paid it.

THE COURT: All right.

Q Now, you have heard testimony with regard to the electricity and the gaining of access. Did either Mr. Rathborne or Mr. Davis speak to you or write to you with regard to getting access?

A You're testing my memory. I will have to look at the file. I am not going to say yes or no. If they did, I will adopt it. All I know ----

THE COURT: Have you got any records?

A I have some documents here. I don't know if he wrote me about the electricity. If he has any letters, I would

look at them.

Q Do you recall any telephone calls?

A I got a telephone call from Mr. Garfinkel that there was trouble between Mr. Rathborne and Mr. Avolon regarding access to the roof.

Q I am asking about the electricity.

A I know nothing about it. If I got a letter, I will adopt it. I can't tell you, no.

THE COURT: He wants to know if you had a telephone conversation?

A I am not going to say.

THE COURT: He doesn't know.

A I don't know. I am not going to commit myself because I'm under oath.

Q Now, you tell us about the legal implications of Mr. Rathborne putting plants on the roof.

A Yes.

Q Did you ever complain to him about it?

A I certainly did.

Q Did you complain to him in writing?

A No -- oh, yes; I think so, I'm not sure. Look at my letters. You looked at them last night.

MR. JACOBS: I read something about complaining about improvements, nothing about plants.

A That's improvements.

Q Did you ever bring an action?

A No. I tell you -- the answer is no.

THE COURT: Go ahead.

Q Thank you. Incidentally, in Judge Wahl's charbers, you testified Mr. Rathborne provoked Mr. Garfinkel. Could you tell me what he did?

A Mr. Rathborne passed some comment with a sneer on his face.

Q What was the comment?

A I said he passed some comment to Mr. Garfinkel.

THE COURT: Do you know what the comment was?

THE WITNESS: I don't recollect it. I do know he had a short fuse and said to him, "I'm going to get even with you." or things like that. I said, "You stop it. You cut it out."

Q Did you ever restrain Mr. Garfinkel on any other occasion?

A Yes.

Q Where?

A At the building.

Q Did you ever ----

A I told him -- I testified a few minutes ago that I always avoided Mr. Garfinkel going upstairs with me.

Q I asked you ----

A The answer is "Yes."

Q How many times did you restrain him?

A Maybe once or twice.

THE COURT: What do you mean restrain him?

THE WITNESS: He went up with me. He made a complaint. Mr. Garfinkel said, "I can't do anything with him. Please come up." I called Mr. Rathborne; I said, "Prescott, I'm coming up." He would say "You come up at this hour." I would go up as soon as it was convenient. I would say, "What's the trouble, Prescott?" I would look around and ask, "Is that what you want fixed? What else do you want" I can't tell you the date. The answer is yes.

THE COURT: I don't know what restraint you are talking about. Did you tell him, "Don't make any remarks, don't fight?

THE WITNESS: Not to my knowledge.

THE COURT: Did he ever fight with him?

THE WITNESS: Never to my knowledge; at no time have I ever seen him have a fight with him.

THE COURT: All right.

Q (By Mr. Jacobs) Just so I can clear up one thing on this air-conditioning unit. Do you know whether the air-conditioning unit was installed prior to Mr. Rathborne having been given exclusive control?

A I don't go to the building every day. I don't manage

the building. I act as his lawyer. That's all I can tell you.

Q You don't like Mr. Rathborne, do you?

A I don't dislike him. I don't say I like him; I don't dislike him. I don't hate anybody.

Q You think he is a Southern bigot?

A Unqualifiedly, yes.

Q Unqualifiedly?

A Yes.

Q What about Mr. Davis, you don't like him either?

A Mr. Davis -- I have a standard of code of ethics that is, perhaps, a little different from the ordinary person.

THE COURT: Was Mr. Davis disbarred?

MR. JACOBS: He was suspended.

THE WITNESS: He is under suspension now.

Q (By Mr. Jacobs) I just asked him a question whether he likes him.

THE COURT: Why don't you go to something else? The testimony here is that Mr. Rathborne doesn't like Jews. He made some statements about Jews. Maybe he doesn't like you either. Why don't you get down to business? You are Jewish, aren't you?

MR. JACOBS: Yes I am.

THE COURT: Even though he doesn't like Jews, he

business purposes.

THE COURT: The leases.

Q (By Mr. Steinberg) You made the two leases which are in evidence, correct?

A Yes.

Q Now, before we get any further, at the time in November of 1972, when he moved out, did he give you a certified mail letter advising you that he is vacating the premises?

A No.

Q Did he pay the rent for the month of November, 1972 for both apartments?

A No, he didn't.

Q In other words ----

THE COURT: Are you suing him?

MR. STEINBERG: Yes, I have a counterclaim.

THE COURT: Go ahead.

Q Now, with regard to the incident about axing the door, will you tell the Court in your own words what you remember or what you recollect about that incident.

A Prescott Rathborne came down to my store. My store is the fourth store there, Your Honor. One of the stores is my liquor store. He came downstairs. He said, "Somebody is breaking down my door." I went outside. I went upstairs. And, he, standing at the

front of the stairs, half nude. I seen this big hole in the door. I said, "Well, this is another reason," I figured he must have had some hippie up there and then he didn't want to allow them in the apartment. I figured this guy went and put a thing through the door. I said, "You're starting in again." Every few days this man was in my store like some quirk; when somebody came over here, whether to cash a check, a personal check or to go to the club where they threw him out on the street, that famous design would come in, it was like he was talking to his father. If something went wrong, he would come into my store, Your Honor. I said, "Are you starting in again" because I knew the last door cost me $190.

THE COURT: Just relax.

THE WITNESS: Right.

THE COURT: What did you say to him?

THE WITNESS: "Why did you break the door down? Why did you break the door down? You have these guys who come into your apartment ..."

THE COURT: Did he have a lot of hippie-types?

THE WITNESS: Yes he did. He had parties there. He had girls. One girl he beat up in his apartment. She came into my store. She had two black eyes. They took her -- they told me to go over to prevent him

from further hurting her.

MR. JACOBS: Objection.

THE WITNESS: I'm telling Your Honor.

MR. JACOBS: Did he see Mr. Rathborne beat her up?

THE WITNESS: She came down. She lived in the apartment. He kept all her clothes. He didn't deny it.

THE COURT: Wait a minute.

THE WITNESS: I said, "Why did you beat her up?" He said, "What the hell, get her out of here." He's standing there. He is not going to deny it.

THE COURT: Take it easy.

MR. JACOBS: I move to strike all that.

THE COURT: All right. I will strike it. He said she was living there. We now know that Mr. Garfinkel is an excitable man. All the testimony has so indicated. What is it you want to find out from him?

Q (By Mr. Steinberg) Did you axe the door? Just sit back and relax. Did you axe the door?

A No, I didn't.

Q Did you put grease on the door?

A No.

Q Did you put any feces or any foul smelling odor on the

door?

A No, I didn't.

Q Was the buzzer on the door working?

A When he moved in, the buzzer was working, both buzzers were working.

Q At the time he moved in -- prior to his moving in, had you reconstructed the building to make it into an apartment before?

A Yes. I renovated the whole building.

Q Was there any time when he was locked out of his own apartment?

A For what reason?

Q He said he was locked out of the apartment and couldn't get in and had to get a key or had to pay some gratuity to get in.

A I don't know for what reason. He had a padlock on the door.

THE COURT: Did you put a lock there?

THE WITNESS: No.

Q (By Mr. Steinberg) Did you ever lock him out?

A I don't know anything about it. No, I didn't.

Q Did you repair the lock to the front door?

A Oh, yes, I did.

Q Who did it?

A The locksmith that was here.

THE COURT: Did you put garbage in his vestibule?

THE WITNESS: No, I didn't.

THE COURT: Did he ask you to have garbage removed and you refused?

THE WITNESS: Any time he asked me to do anything, Your Honor, I did it. Whether it was for a suggestion or what.

Q (By the Court) Did you ever refuse to give him access to the basement so he could turn on his electricity?

A Yes, I did. Let me explain something. There is two basements. One basement is in the building where I gave him permission to put old things, to put his old trunk. I let him use the other air conditioner, Your Honor. Let me explain something, the fusebox is housed in this Munchtime basement. When he told me the lights were out in his apartment, I said to him, "Go downstairs." He said, "The guy isn't going to let me go down to put in the fuse." They used too much on the line. Too much was used on the line. I walked over and said, "The guy wants to go in and put the fuse in. It's only going to take five minutes." He said, "I'm not going to let him down there." I said, "The guy is without lights." Your Honor, the whole thing stemmed from me trying to be a pacifier between two guys. I shouldn't be in the action. Munchtime should be because his fight was with

them. It was not with me.

MR. STEINBERG: Lean back.

Q (By the Court) Did you authorize Mr. Steinberg to file an action against him to get him out?

A Yes, because he was getting on my nerves.

Q All right.

A Your Honor, I couldn't operate my liquor store.

Q You had already given Munchtime ----

A Judge, let me say this ----

MR. STEINBERG: Sol, let the Judge talk.

Q You had given Munchtime authority to put an air-conditioning unit on his roof?

A Right.

Q Later on you gave Mr. Rathborne a lease that contained a provision giving him exclusive use of the roof extension directly over the space occupied by Park Use Tours. How did it happen you gave that to Munchtime?

A This was all done in such a beautiful friendly state that when you say "exclusive" the man didn't have a business. He was there when they installed the unit, the big air-conditioning unit. The truck was there. They put it on the roof, Your Honor. He was there when they put the fans on the roof. He was there and everything was fine. The thing that provoked him is

that they didn't call him for an appointment and one of the men came to his apartment that he had five times given permission to do it now.

MR. STEINBERG: That's all I have.

THE COURT: Go ahead.

THE WITNESS: He gave him permission five times, and this time he didn't.

CROSS-EXAMINATION

BY MR. JACOBS:

Q Mr. Garfinkel, when Mr. Rathborne first approached you about renting an apartment, was the building complete; were the apartments ready?

A Not all of them. The first one was ready.

Q Apartment 5?

A Yes.

Q At that time did he discuss with you the fact he might want both apartments, 4 and 5?

A He said he might, yes.

Q In fact, while the work was going on in Apartment 4, even before he signed the lease, didn't Mr. Rathborne ask the man who was constructing Apartment 4 to make certain changes so he could use both apartments?

A Yes, he did, but he couldn't do it because the building architect had already made the layouts, you understand. You can't do it unless you make another new filing;

new plans. You can't do it. I told him. He saw the plans. He said, "Okay." He wanted it. I didn't want ----

THE COURT: That's all. Go ahead.

THE WITNESS: I'm sorry.

Q Was everything possible done within the C. of O. to satisfy Mr. Rathborne's desire of having both apartments?

A When you talk about C. of O., the one apartment, he lived in.

Q Right. Then he wanted the second one?

A Then he wanted the second one. Everything was okay in the first apartment. Now you're talking about the second apartment?

Q Yes.

A The walls, everything just the way the C. of O. reads, that's how Mr. Prescott Rathborne said he was going to have. He said he was going to use it for commercial purposes.

THE COURT: We will have to quit at 12:30. I have another hearing. This hearing has extended longer than I anticipated. If this hearing isn't finished by 2:15 or 3:00, you will have to come back at 7:00 tomorrow morning.

MR. JACOBS: We should finish, Your Honor.

MR. STEINBERG: I heard you came in early this morning.

THE COURT: Don't ask any unnecessary questions. Mr. Garfinkel, don't make any speeches. Just answer the questions.

Q (By Mr. Jacobs) Mr. Garfinkel, with regard to the roofs, did Mr. Rathborne tell you what he wanted to do with these roofs?

A He told me he wanted to use it. He has friends up there. He had some guys come up with a banjo. He wanted to play the banjo there. They had use of the roof. He didn't want anybody to bother his crowds. He wanted it for them.

THE COURT: Did he tell you he wanted to put a garden up there?

THE WITNESS: He said he was going to put some flowers up there.

Q Over the period of time, you saw him put flowers there?

A Yes.

Q You didn't object?

A No, I didn't object.

Q Now, did you put any air conditioner there?

A I told him -- I verbally told him, "If the building inspector tells me you got to take it down, you've got to take it down." I tell him this to his face.

Q With regard to the door lock near the roof, the one -- ultimately, in 1972 there was a violation, was there any discussion when Mr. Rathborne first moved in or shortly thereafter about that lock?

A Was there a discussion?

Q Between you and Mr. Rathborne?

A I told him the same thing. I said, "If the fire department comes around, if it's a violation, you will have to open the door for fire hazard if they have people in the building who have to use it."

THE COURT: You gave him permission to put the lock on?

THE WITNESS: No, I never gave him permission. I told him he wants to put it on, he can put it on. He was afraid of these guys from across the street.

THE COURT: He gave him permission.

THE WITNESS: He done it on his own.

Q Was there any discussion with Mr. Rathborne and an architect of his and the fire department back in 1966 about that?

A I don't know. I don't understand.

Q Was there any discussion with the fire department back in 1966 or '67 about that lock?

A When?

Q Early in his tenancy?

A Nobody ever said anything to me from the fire department, no architect or anybody to it being open.

Q Did you put any air-conditioning unit in Mr. Rathborne's apartment yourself?

A At the beginning, two of them. If I didn't pay him cash, I paid him for two. One for the top floor; he wanted a bigger unit. He was having a lot of people in there. He said he is going to take out my unit.

THE COURT: He paid for two.

THE WITNESS: I did. I paid him cash. He got paid.

Q Is it an accurate statement to say that the disputes in 1966 and '67 revolved around the fact Mr. Rathborne felt you hadn't made certain improvements you were supposed to under the lease and therefore he didn't pay rent; is that what was happening in 1966-'67?

A A couple of times he didn't get his checks from his estate. So I carried him. He told me they were late. His girls that worked for him said he didn't have the rent. I let it go. A couple of times he didn't pay the rent because he wanted to be obnoxious. I knew his girls, the secretary told me that he hadn't gotten it from the guarantee trust company, his check. Sometimes I carried him.

THE COURT: He says sometimes he carried him and

sometimes he didn't.

A Only when he was obnoxious.

Q Now, at the time of the axing incident ----

A Yes.

Q Did you accuse Mr. Rathborne of axing the door himself?

A Yes, I did -- not him, but one of his cronies.

Q Didn't Sylvia tell you that somebody had axed the door?

A She didn't tell me. When I came up at the top of the stairs and when I was screaming at him, "It was one of his cronies." She said she saw somebody running down the stairs. It could have been one of his friends who came down from there.

Q Did you scream at Sylvia and tell her to get in her apartment?

A I certainly did. I certainly did because she didn't know him like I did and his friends.

Q Did you point to the door and say, "This is nothing compared to what is going to happen in the future?

A Yes, I could have said this to him. I was livid with rage. I never struck anybody in my life. I never got locked up ----

THE COURT: Wait a minute. Go ahead.

A In 58 years.

Q How often did you get livid with rage with Mr. Rathborne?

A I could truthfully say once a month for five years and

not a punch was thrown.

Q Mr. Steinberg didn't recall what was said in Judge Wahl's chambers that caused you to get livid. Do you recall what Mr. Rathborne said?

A "That mockey" you know, anybody that says that about you ----

THE COURT: What did he say?

THE WITNESS: A mockey. You know what a mockey is? It's a low form of a Jew. He pointed to Mr. Steinberg and said that -- he was talking to one of the girls and said that.

Q Judge Wahl was sitting there?

A He didn't hear it. He heard me get worked up about it.

THE COURT: What did Judge Wahl say to you?

THE WITNESS: He didn't say anything. He said, "Take it easy, young man."

THE COURT: He called you a young man?

THE WITNESS: Yes. Judge Wahl is older than I am.

Q Out in the hallway, after these court sessions, did you scream and holler at Mr. Rathborne?

A He was giving me -- causing me much finances with lawyers that I screamed at him in the hall, "You know, Prescott, one of these days, I'm going to hit you with a bat." It was just out of rage.

A I don't follow you.

Q Did you threaten Mr. Rathborne and scream and holler at him upstairs?

A I don't remember. I could have. I told you I figured I had another hundred-dollar damage.

THE COURT: Do you want to show he didn't threaten him?

MR. JACOBS: That he testified before trial, Your Honor, he did.

THE COURT: You want to establish that he didn't do that?

MR. JACOBS: I want to show he is inconsistent, Your Honor.

THE COURT: We know that. You don't have to ask him that question.

Q Mr. Garfinkel, did you have the door repaired?

A Yes.

Q You heard the testimony of Mrs. Allen and Mr. Rathborne? They all lied?

A About what?

Q They all said the door was not repaired.

THE COURT: You didn't ask him when it was repaired.

Q (By Mr. Jacobs) When was the door repaired?

MR. STEINBERG: We have the bill.

Q Wait a minute. Let him answer the question. When was

the door repaired?

MR. STEINBERG: We have the bill.

THE COURT: [illegible]n was the door repaired, after the plaintiff left the premises?

THE WITNESS: A couple of days later. I saw Prescott. I said, "Prescott, I'm tired of spending money. You're going to have to repair it." Well, a few days went by and I said, "What the hell, it's got to be done."

Q So you repaired it?

A You cannot repair it right away. It takes to get a workman up there, three to four months -- three to four weeks before you get a door; the locksmith also has to wait.

THE COURT: Was the door repaired prior to the time Mr. Rathborne left?

THE WITNESS: I think so, yes. I think it was. The door was in with two locks. I had new locks put on.

THE COURT: The bill is in the record?

MR. STEINBERG: Yes. We have it. We have the bill, Mr. Jacobs.

Q (By Mr. Jacobs) Mr. Garfinkel, did you walk around on Mr. Rathborne's roof terrace?

A Many times he would invite me.

Q Without Mr. Rathborne being present?
A Even though I have rights, I very seldom ever did it. I did it, but I very seldon did it.
Q For what purpose did you do it?
A I'm the landlord.
THE COURT: Why did you go there?
THE WITNESS: I want to see that the property -- I used to see, Your Honor, the hall partition taken out, which is against the law. This man could have broken my property up.
THE COURT: He did. Go ahead.
THE WITNESS: I'm permitted ----
THE COURT: That's all, Mr. Garfinkel.
THE WITNESS: I'm allowed to do that.
THE COURT: Anything else?
Q (By Mr. Jacobs) You looked into the windows; you walked around on the roof?
A Oh, yes. I spoke to him. We talked. He saw me.
Q I'm talking about occasions when Mr. Rathborne was not there.
A Very rarely; very rarely.
MR. JACOBS: That's all.
THE COURT: You can step down.
THE COURT: Is that your case?
MR. STEINBERG: That's our case.

213A

34. Tenant agrees to execute immediately upon Landlord's request all documents necessary to effectuate the processing of Landlord's application to the City Rent and Rehabilitation Administration.

35. On the condition that Tenant has fully and faithfully observed, performed and complied with all the terms and conditions of the within lease, Landlord hereby grants to the Tenant an option to extend or renew the within lease for an additional period of two years, upon the same terms and conditions except that Tenant agrees that the rent for the extended term shall not exceed $275.00 per month. Notice of election to exercise the option must be sent by Tenant to Landlord in writing by registered or certified mail at least sixty (60) days prior to the expiration of the term herein demised, but in no event shall the notice be sent prior to July 1st, 1967.

36. At Tenant's option, Tenant may make changes in the lay out, etc., at his own cost and expense, provided that prior to such work being commenced, Tenant first submits the proposed changes to Landlord in writing for Landlord's written approval and provided further that Tenant obtains the approval to such changes from the proper departments of the City of New York having jurisdiction thereof. Should Landlord disapprove, Tenant will be immediately notified.

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apartment is a part; that the work has been in progress for some time prior to the execution of this lease; ~~that such work has been done under Alteration No.~~ under plans prepared by Fred L Liebmann, Architect, which plans were approved by the Department of Buildings of the City of New York. A copy of said plans have been initialled by the ~~Tenant.~~ That Landlord proposes to apply to the City Rent and Rehabilitation Administration for an increase of the maximum rent of the subject apartment based upon such major capital expenditure and substantial rehabilitation pursuant to § 33 of the Rent and Eviction Regulations. Tenant agrees to pay the rent reserved and agreed upon herein pending approval of Landlord's application to the City Rent and Rehabilitation Administration.

33. It is understood and agreed between Landlord and Tenant that in the event the City Rent and Rehabilitation Administration fixes the rent at a sum lower than the amount agreed upon herein, namely, $250.00 a month, the Landlord will accept such lower amount of rent than agreed upon between the parties. The Landlord however, reserves the right to protest any such decision to fix a lower rental and the Tenant agrees to abide by any decision. If the rent fixed by the City Rent and Rehabilitation Administration exceeds the amount agreed upon between Landlord and Tenant herein, Tenant shall be required to pay only the amount reserved in this lease.

34. Tenant agrees to execute immediately upon Landlord's request all documents necessary to effectuate the processing of Landlord's application to the City Rent and Rehabilitation Administration.

35. Tenant is hereby given the exclusive privilege of using the roof extension located directly over the space occupied by Park East Tours (facing east) on the condition that he maintains the same and keeps the roof in good order and repair, at his own cost and expense.

36. Tenant may replace the present windows leading to and facing the said roof extension with French type doors, said work to be done at his own cost and expense.

37. Tenant is hereby given the privilege, at his own cost and expense to install ~~one~~ air-conditioning units in the subject apartment and ~~one~~ air-conditioning units in apartment No. 5, said air-conditioning units not to exceed one ton capacity.

38. On the condition that Tenant has ~~fully~~ and faithfully observed, performed and complied with ~~all~~ the terms and conditions of the within lease, Landlord hereby grants to the Tenant an option to extend or renew the within lease for an additional period of two years, upon the same terms and conditions except that Tenant and Landlord agree that the rent for the extended term shall not exceed ~~$275~~ $250.00 per month. Notice of election to exercise the option must be sent by Tenant to Landlord in writing by registered or certified mail at least sixty (60) days prior to the expiration of the term herein demised, but in no event shall the notice be sent prior to January 1st, 1968.

Sent to Penn 215A

PRESCOTT H RATHBORNE
200 EAST 53RD STREET
NEW YORK, N.Y. 10022
PLAZA 5-0-00

March 1, 1971

Mr. Max Steinberg
6 E. 45th St.
New York, N.Y.

Dear Mr. Steinberg,

Please be advised that I want Munch Time U.S.A's air-conditioning equipment placed upon my premises(which I understand your client authorized),for which I pay rent, removed forth with.

Please be advised that the long,overdue (several years) painting due the apartment be arranged promptly.

Please have the numerous other problems such as the various firehazards, garbage removal, etc. resolved promptly- for five years is a bit too long to prolong such matters.

Respectfully,

Prescott H. Rathborne

PLAINTIFF
EXHIBIT
U. S. DIST. COURT
E. D. OF N. Y.

3-17

216A

Feb 23, 1972

Saul Garfinkle, President
873 Third Avenue Corp.
873 Third Avenue
New York City, N. Y.

Dear Mr. Garfinkle:

As you know, my lease gives me exclusive use of the roof adjoining my third floor apartment. For some time, you have permitted another tenan Munchtime, to install heavy equipment on the roof, in complete violation of my lease and to severe damage to me and my tenancy.

I therefore make demand that you take immediate action to secure the removal of any property of Munchtime or anyone else from my roof in complete violation of my lease,

Very truly yours,

Prescott Rathborne

Need a reason for waiting so long.

PLAINTIFF
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

4-1D

76

217A

PRESCOTT H. RATHBORNE
200 EAST 53RD STREET
NEW YORK, N. Y. 10022
PLAZA 5-0100

March 24, 1972

Saul Garfinkle, President
873 Third Avenue Corp.
873 Third Avenue
New York City, N. Y.

Dear Mr. Garfinkle:

As you know, my lease gives me exclusive use of the roof adjoining my third floor apartment. For some time, you have permitted another tenant, Munchtime, to install heavy equipment on the roof, in complete violation of my lease and to severe damage to me and my tenancy.

I therefore make demand that you take immediate action to secure the removal of any property of Munchtime or anyone else from my roof in complete violation of my lease.

Very truly yours,

Prescott Rathborne

Witness Laurene Johnson
NR 26563
delivered Mar 25, 1972 to Mr. G.
by hand
365

PLAINTIFF
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

5. 1D

218A

PRESCOTT H. RATHBORNE

200 East 53rd Street

New York, New York 10022

May 22, 1972

Attention: Mr. Sol Carfinkle

Please be advised your were seen and overheard authorizing people to visit my roof without my authority. These same people were seen on my roof.

Prescott H. Rathborne

PHR:gj

Delivered by Hand

PLAINTIFF

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

6-17

TE 8-3796 TxA

219A

WOH PRODUCTIONS INC.
425 EAST 63RD STREET
NEW YORK 21, NEW YORK

ADDITIONAL PROVISIONS UNDER CONTRACT DATED June 2 1966

The land lord will allow Mr. Rathborne to have, at his expense and option the following.

1. Re place or imporve for burglary protedtion the wooden door on 2 nd floor.
2. Place adaquate signs in halls, and/or d or/and/ or street.
3. To use the apartmant for business use as may be regired.
4. Have the option to subleas e the apartment to nice respectable people at his option.
5. Have the right to install an a ditional door into the apartment from the hall.

The following are the sole responsibility of the landlord and will be done by him at his expense. Occupancy will begin today with the deposit he rewith acknowledged, howe ver, rent begins only upon completion of all below.

1. Provide an automatic door release with buzzer system and audioable telephone for the street door in both apartments leased by Mr. Rathborne, and keep same always in working order.
2. Same as above (#1) on second floor entrance.
3. Clean like new or retile tile 2nd and 3rd floor hall tile. & kitchen.
4. Finish door dill on 3rd floor like rest of apartment.
5. Repair faucet and shower to bath on 4th floor.
6. Professionally finish 3rd and 4th floor bath floors.
7. Provide daily garbage removal.
8. Provide daily hall maintebance.
9. Cover pipes and finish stairs to roof on 2nd floor landing.

135

Pltf's Ex. H
for id. 6/21/74 gs.

220A

PRESCOTT H. RATHBORNE
200 East 53rd Street
New York, New York 10022

4pm 27 June 72

Mr. Sol Garfinkle
873-875 Third Avenue Corp.
New York, New York

Dear Mr. Garfinkle:

I demand you have the front door to my apartment repaired promptly.

Yours very truly,

Prescott H. Rathborne

PHR:gj

cc Brad Davis

PLAINTIFE

EXHIBIT
U. S. DIST. COURT
E. D. OF N. Y.

8 12

221A

PRESCOTT H. RATHBORNE

Mr Sol Garfinkel
S 873-875 3rd Ave
873-875 3rd Ave
N.Y. N.Y.

June 30 1972

Dear Mr Garfinkel,

I herewith demand you
turn my clothes back on
and leave it on.

Prescott Rathborne

PLAINTIFF'S
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

9-LD

222A

PRESCOTT H. RATHBORNE

July 3 1972

Dear Mr Canfield,

This should serve notice that my apartment is without electricity as well as the halls.

Furthermore your refusal to provide the same or allow me access to turn on the same is contrary to our lease.

This situation is dangerous and has caused me damages and expenses for which I hold you responsible.

This problem is in addition to the more damage to my front door and all the other

PLAINTIFF
EX. 311
U. S. DIST. COURT
S. D. OF N. Y.

11-10

change your address to Bowerston.

In addition the recent weather has nearly disrupted my right to peace and enjoyment of our home and ruined my life.

In as much as I live at home and spend my days at home, the lack of electricity and its ever problems make my life and others surrounding me my life on which depend electricity a great burden.

Electricity has been lacking since Saturday July 1, 1972.

Respectfully

D. Dahl

PRESCOTT H. RATHBORNE

224/A

Central Complaint
Dept of Rent + Housing Maintenance
215 W 125
N.Y. N.Y.

July 4, 1972

Dear Sir:

There has been a number of problems which have happened here recently. I called your office July 1st 2nd 3rd and 4th to report no electricity in my entire apartment and in the hallways. Each day you promise prompt emergency service yet there has been no-one to see the situation - no one has contacted me.

I can need not list the many personal injury, health, burglary and many other hazzardous situations. I would appreciate it if you would act upon this matter promptly.

Respectfully Prescott

PLAINTIFF
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
12

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225A

PRESCOTT H. RATHBORNE

5 July 1972

373-375 3rd Ave Corp
373-375 3rd Ave
N.Y. N.Y. 10022

Gentlemen

I demand you promptly restore my electricity and the electricity to the building. You are violating the law with the same.

I do not see fit often like these matters. I am enclosing your check. Unconditional action and/or immediate compliance is expected. Otherwise I will be obliged to pursue my rights in all courts

USA 33s - 475
(ED. 4-23-71)

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

13

FPI-NI—4-8-74-30M-2001

[illegible] [illegible] already
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[

227A

Con Edison
Both Troublemen:
Mr. Norm Douglas
and
Mr. D. Donahue
Com: # 66712 B.N: UNDA
Dept: Const.
Sit. Cond. Knee refused to left
Com. to 6th into basement
Mon. July 17th 3:00 pm.

D. Donahue

Dept # : 33621 -> L. Lacombe

PLAINTIFF'S
EXHIBIT
U. S. Dist. COURT
S. D. OF N. Y.

34-A

228A

MAX STEINBERG
COUNSELLOR AT LAW
6 EAST 45TH STREET
NEW YORK 17, N.Y.
MURRAY HILL 2-4702

June 12, 1972

Mr. Prescott Rathborne
200-202 East 53rd Street
New York, New York 10022

Dear Sir:

Mr. Sol Garfinkel, president of 873 Third Avenue Corp. has communicated with me with reference to the following matters which require your attention.

1. You are requested to remove all wooden shutters and restore glass to all windows.

2. You are requested to promptly remove the lock or bolt on the roof, as directed by a representative of the Fire Department of the City of New York.

3. You are requested to immediately restore to apartment four the stove and refrigerator which landlord removed at your instance and request and stored in the basement of the building. This must be done on or before June 19, 1972.

Although a violation has been placed against apartment four by the Department of Buildings of the City of New York, I am informed that you are utilizing the said apartment for commercial purposes and that you employ persons to conduct your affairs. The use of this apartment for commercial purposes must be discontinued forthwith.

Very truly yours,

Max Steinberg

MS:as

PLAINTIFF
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

7-12

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229A

PRESCOTT RATHBORNE ~~ASSOCIATES, INC.~~

200 EAST FIFTY-THIRD STREET

NEW YORK, N. Y. 10022

PLAZA 5-0100

September 11, 1972

Chief Engineer Nissen
Dept. of Housing & Maintenance
Municipal Building
New York, New York

Dear Mr. Nissen:

Your aid is requested in order to satisfy a hardship case regarding my physical well being. In addition, your aid would help save time and money for the Building's Dept., the Fire Dept. and the courts.

A copy of the official altered plans - Application 1425 1960 Block 1326 Lot 45 location 875 3rd Avenue in Manhattan, are requested today so as to more fully satisfy the Fire & Building's Code and not, at the same time, create for me an extremely hazardous situation. By complying with the present suggested alternative re a Fire Dept. case scheduled for Thursday, Sept. 14th, a far more dangerous situation is created which would leave me no door between my living quarters and the street. There is neither a doorman nor a secure front door on the building. Even if a secure front door were provided I still should have the right to keep my apartment doors locked.

There are serious questions as to whether there is, in fact, a violation regarding the entrance in question. But if there was a violation there is still no need for the present apartment entrance in question to be open as there are more than sufficient fire exits in every apartment. It is my intention to present to the court a far sounder and safer solution in the best interest of all. An official copy of the plans is essential in order to allow the court the opportunity to make such a decision.

This building was again burglarized last night. The adjoining large five story building abutting my apartment is a center for drug addicts and 30 feet from the ineffective front door is 3rd Avenue which is a major heroin distribution center, crowded with hundreds of pushers day and night. In fact, this one block contains a total of no less than 6 buildings full of addicts, plus the street addicts. Murder, robbery, fires, holdups, assaults, harassment, unexplained deaths, and other problems are a nightly occurrence here. Twice within the last six months attemps were made on my life.

This block has been given national news coverage of its unique problems. Your providing me with a copy of these official plans may provide me with an opportunity to keep these addicts out of my apartment and save my life. If not, then the present course of actions will provide no locked door whatsoever between my home and the public hall, nor an effective front door between me and the street. Thus, in effect, an open opportunity to all drug starved addicts, et al. My apartment would be open to all the public - which here is a proven hazard - a very grave danger.

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230A

September 11, 1972

Furthermore, the residential part of the building has only two tenants and both of us would be unnecessarily risking our lives over a supposed violation which can be remedied in a building with more than adequate egress for everyone.

I am,

Respectfully,

Prescott H. Rathborne

PLAINTIFF'S
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

18

23; A

4710

MAX STEINBERG
COUNSELLOR AT LAW
6 EAST 45TH STREET
NEW YORK 17, N.Y.
MURRAY HILL 2-1302

RECEIVED JUL 05 1972

June 22, 1972

RECEIVED JUL 05 1972

Mr. Prescott Rathborne
200-202 East 53rd Street
New York, New York 10022

Dear Sir:

On June 12, 1972 I wrote you a letter which stated in part as follows:

> "2. You are requested to promptly remove the lock or bolt on the roof, as directed by a representative of the Fire Department of the City of New York."

On June 19, 1972 your attorney, Bradley Barton Davis answered said letter on your behalf and stated in part as follows:

> "Item 2 is being attended to in co-operation with the Fire Department".

Today, at approximately 2:30 P.M. a representative of the Fire Department visited the premises and found that you had not removed the bolt or bar which was the subject of a part of my letter of June 12, 1972.

You are herewith advised that based upon the Fire Department's directive issued this day by Captain Heinson, Engine No. 8, located at 165 East 91st Street, New York City, that the following violation, created by you, must be forthwith removed, to wit:

> "Remove cross bar on outside of bulkhead leading to roof and maintain same at all times".

In the event you forthwith fail to comply with said directive landlord will be exposed to criminal prosecution. You are requested to advise either Mr. Garfinkel, or the undersigned or Captain Heinson when the said condition has been complied with. Failure to cooperate shall result in a proceeding for your eviction.

Very truly yours,

Max Steinberg

MS:as
Certified Mail
c.c. Captain Heinson

362

51-40

232A

DEPARTMENT OF RENT AND HOUSING MAINTENANCE
OFFICE OF RENT CONTROL

Docket No.

COMBINATION APPLICATION FOR DECONTROL, NOTICE AND ORDER

ACCOMMODATIONS NOT OCCUPIED AS TENANT'S PRIMARY RESIDENCE (§18 of the Regulations)

1. MAILING ADDRESS OF LANDLORD
NAME: 873 THIRD AVENUE CORP. c/o MAX STEINBERG TEL. NO.: MU.2-1582
NUMBER AND STREET: 6 EAST 45th STREET
CITY, STATE AND ZIP CODE: NEW YORK, N.Y. 10017

2. MAILING ADDRESS OF TENANT: TEL. NO.
NAME: PRESCOTT RATHBORNE APT. NO.: s.4 & 5
NUMBER AND STREET: 200 East 53rd Street, a/k/a 873-875 Third Avenue
CITY, STATE AND ZIP CODE: New York, New York 10022

3. Number and Street: 200 East 53rd Street, a/k/a 873-875 Third Avenue, New York City (Apartment No.): 4 & 5 (must be completed) (Borough and Zip Code): Manhattan 10022

4. Multiple Dwelling Registration No.: 135137 (Must be registered with Office of Code Enforcement)

5. Managing Agent (Natural Person Only) registered with the Office of Code Enforcement: Sol Garfinkel (Business Address): 875 Third Avenue, N.Y.C. (Telephone No.): PL.3-3113

FILING INSTRUCTIONS: Complete an original and three copies of this form plus two additional copies for each person named in Part D on the reverse side of this application. Be sure that the original and all copies are signed before filing with the District Rent Office.

PART B — NOTICE OF COMMENCEMENT OF DECONTROL PROCEEDINGS

TO: The tenant indicated above *and* all parties named in Part D

On the reverse side of this form (**Part A**) is an application for the decontrol of the above described housing accommodation pursuant to §18 of the Regulations on the ground that the housing accommodation is not occupied by the tenant as his primary residence. Your landlord in Part A has made certain allegations concerning your occupancy of the subject housing accommodation, which if correct, may entitle him to an order decontrolling the housing accommodation occupied or rented to you.

You are hereby afforded an opportunity to oppose this application and to submit evidence to establish that the housing accommodations is your primary residence. Your answer must be filed in duplicate upon the answer forms enclosed herewith. Both the original and one copy must be signed by you and returned to this office within seven days from the date appearing at the bottom of this notice.

JUL 26 1972
(Date of Mailing)

District Rent Director

(FOR DISTRICT RENT OFFICE USE ONLY)
PART C — THE ORDER

After consideration of all the evidence in the record, and upon the grounds stated in Section 18 of the Regulations, the District Rent Director [only box marked "x" is applicable]

A ☐ **FINDS** that the housing accommodation referred to in item 3, above, is not occupied by the tenant as his primary residence and it is therefore **ORDERED** that said housing accommodation be, and the same hereby is, decontrolled.

B ☐ **FINDS** that the housing accommodation referred to in item 3, above, is occupied by the tenant as his primary residence and it is therefore **ORDERED** that the within application be, and the same is hereby denied and said housing accommodation continues to remain subject to these Regulations.

C ☐ **FINDS** that the housing accommodation referred to in item 3, above, is not eligible for decontrol pursuant to Section 18 of the Regulations and said housing accommodation continues to remain subject to these Regulations for the reason that (*state grounds for denial if B, above, is not applicable*).

Issued: ..... 197.....

District Rent Director

APPLICATION FORM A-18 (5-72) *(See Reverse Side)*

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233A

PART D — OTHER PARTIES

(Complete only if item 7 is answered "yes")

*Mailing address of other parties to these proceedings:

NAME	NAME
NUMBER AND STREET	NUMBER AND STREET
CITY, STATE AND ZIP CODE	CITY, STATE AND ZIP CODE

*Other parties affected by this order. *Insert the names and mailing address of parties presently occupying the housing accommodation referred to in item 3 on the reverse side of this application form.*

PART A — THE APPLICATION

The undersigned landlord hereby makes application for an order decontrolling the housing accommodation referred to in item 3 of this application pursuant to Section 18 of the Regulations on the ground that the housing accommodation is not occupied by the tenant as his primary residence.

6. The tenant maintains his primary residence at 200 East 53rd Street, a/k/a 873-875 Third Avenue (number and street) New York, New York 10022 (City, State and Zip Code)

7. Is the housing accommodation occupied by any other party than the tenant specified in item 2, above? ☐ "Yes"; ☒ "No". If your answer is "Yes", insert the names and mailing address of such parties in PART D, above.

8. Set forth a complete and full statement of facts and circumstances which establish the tenant's primary residence to be at the location set forth in item 6, above.

Tenant, a single person, occupies apartments 4 and 5 (residential accommodations) in the subject building. Each apartment consists of four rooms. The maximum rent for each apartment is $250.00 a month.

Tenant has two residences in the same building, which is inconsistent with the purpose,=spirit and intent of Section 18 of the Housing Rent Regulations. It is an inequitable situation.

Apartment 4 2a was formerly utilized for business purposes although the rental agreement provided for residential accommodations. Upon notice being served upon the tenant, tenant allegedly discontinued the use of the commercial aspect of the apartment and now utilizes the same, upon information and belief, for housing purposes. The tenant, being single, does not have need for two housing accommodations. The primary housing accommodation is apartment 5. Landlord asks for decontrol of apartment 4 pursuant to law.

I have read the foregoing application, including the accompanying documents, and hereby affirm under the penalties provided by law that the contents thereof are true of my own knowledge.

873 THIRD AVENUE CORP.

BY: [signature] (signature of landlord) (or corporate officer)

It is now a misdemeanor for any person to make a false statement or give false information in connection with any application for which a certificate may be issued pursuant to the Housing Rent Regulations. Violators may be subject to the penalties provided by law.

Dated June 8, 1972 197....

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52.id

734A

THE CITY OF NEW YORK—HDA
DEPARTMENT OF RENT and HOUSING MAINTENANCE
OFFICE OF RENT CONTROL

2 LAFAYETTE STREET
NEW YORK, NEW YORK 10007

DOCKET NO.

ANSWER TO APPLICATION

(Number and street) (Apartment or room No.) (Borough and Zip Code)

Address of housing accommodations 200 East 53rd Street, Manhattan, Apt. 4-5, N.Y. 10022

INSTRUCTIONS: An original and one copy of this answer and accompanying documents, if any, must be filed within seven days from the date appearing on the notice which accompanied this answer form. The answer must be filed with the District Office by delivery or mailing. Before filing the answer be sure to sign it.

TO THE PARTY SIGNING THIS ANSWER: If your present post-office address is different than the address indicated on the last notice which was served upon you in this proceeding, you should complete the following: My present post-office address is

NUMBER AND STREET.....

CITY, STATE AND ZIP CODE.....

I very vehemently oppose the landlord's application for decontrol as yet another step in its attempt to drive me from my home so a huge office building can be built on the block. Among the other harassments I have had to endure is no electricity for this month, axing and refusal to repair my front door, no buzzer system at the front door of the building so that addicts (As yet another harassment, no less than six buildings on the block are "drug rehabilitation" centers) can enter at will, efforts to force me to remove a lock to my terrace as a technical fire violation so that these same addicts could enter my apartment at will, and constant threats by the landlord to my life and property, refusal to repair my plumbing or my roof, and refusal to clean the building hallways. I hope that you will see that this is just another attempt at harassment, this time by decontrolling the apartment so the landlord can set a sky-high rent forcing me to move or simply evicting me.

There is no question that what is designated as "Apartments 4 and 5" is in fact a single duplex apartment. On the third floor is a living room and a den-library; on the fourth floor is a bedroom, a kitchen and a dining room. There is a bathroom on each floor. The hallway between the floors also is part of my apartment. This is how the apartment was rented to me and now it has always been occupied. Moreover I have spent thousands of dollars in renovations to the floor which the landlord seeks to decontrol: if he attempted fairly to have me vacate the apartment, he would have to reimburse me for all of this. Undoubtedly, he is using this procedure to try to avoid such responsibility.

I do not and did not use the premises for 'business 'purposes. My only income for the entire period I have been in occupancy of the apartment (which has been since 1965) has been from a trust fund administered in Connecticut and income from land located in Louisiana.

(Over)

I have read the foregoing answer and I hereby affirm under the penalties provided by law that the contents thereof are true of my own knowledge.

It is not necessary that the foregoing answer be sworn to but false statements may subject you to the penalties provided by law.

.....
(Signature of Landlord (Tenant))

Dated ..... 19 ..

THIS FORM MUST BE FILED IN DUPLICATE

FORM RR-4 (Rev. 1-68)

I should add that for years the landlord overcharged me: Finally, I sued and the matter was settled by the landlord paying me $2,000.00.

The question of harassment, which I understand mandates dismissal of this petition, is clear and has even been documented in a New York magazine article which I will submit at the hearing. To say I live in half ofmy apartment but not the other half, that I live in my bedroom but not my living room, merely shows the lengths of absurdity to which the landlord will go to try to drive me, and many other tenants, from my home. This matter is under investigation by the Attorney-General as per the annexed letter, and I trust you will keep in communication with that office for the duration of that matter.
The Attorney-General has advised that the landlord is not even the real owner of the property.

Prescott Rathborne

PRESCOTT RATHBORNE

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THE CITY OF NEW YORK- HDA
DEPARTMENT OF RENT AND HOUSING MAINTENANCE
OFFICE OF RENT CONTROL

District Rent Office
2 Lafayette St.
New York, N.Y. 10007

DOCKET NO.
2 DPR 212

REPLY TO ANSWER OF TENANT

Address of housing accommodations 200 East 53rd Street, Manhattan, Apt. 4 -5
Manhattan 10022

The tenant alleges that apartments 4 and 5 are a "single duplex apartment". The tenant is clearly mistaken. Two separate leases were entered into for two separate apartments. Each apartment is a self-contained unit containing two separate entrances. Each apartment consists of a living-room, bedroom, kitchen and bathroom on two different floors. There is no interior stairway between said apartments.

The certificate of occupancy annexed hereto reflects that each apartment is located on a different floor. The apartments are registered with the Local Rent Office as two separate units. A public hallway cannot be rented to the tenant. The leases between landlord and tenant do not so provide.

The question as to the use of one of the apartments for commercial or business purposes was resolved by the Department of Buildings of the City of New York wherein it was found that the lower floor apartment, to wit, apartment 4 was utilized for commercial or business purposes and that landlord was fined by the Criminal Court for a violation arising out of tenant's use. Tenant was advised of this violation.

With regard to apartment 4, at tenant's request, landlord removed the refrigerator and stove from said apartment. Landlord requested restoration of the refrigerator and stove to tenant's apartment upon receipt of the violation but tenant refused such restoration, acting upon the advice of his attorney.

The extraneous allegations of "harassment", proposed erection of anew building, drug addicts and other unrelated matters was raised in an action instituted by the tenant in the Supreme Court, New York County. This action sought an injunction against the landlord and a commercial tenant for the so-called "harassment" acts. Mr. Justice Frank of the Supreme Court denied the application.

The questions of failure to furnish electricity arises out of a dispute

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between this tenant and a commercial tenant. Mr. Justice Frank made a direction regarding this matter. A copy of the court's decision is annexed hereto.

Since the receipt of the answer of the tenant to the within application, tenant has instituted a harassment proceeding with the principal office under docket number 2240-HL.

Landlord is the lessee landlord under a long term lease which expires in 1993. Landlord, as has been stated to the Supreme Court, has no interest in any other property being assembled. It has no relation by blood, family or business ties with any person, persons or entity assembling the area involved.

The certificate of occupancy is conclusive and binding upon this tenant and his claim of a duplex apartment is fictitious and imaginative.

I have read the foregoing and I hereby affirm under the penalties provided by law that the contents thereof are true of my own knowledge.

873 THIRD AVENUE CORP.

BY: _____

Sol Garfinkel - Pres.

Dated August 7, 1972

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...accommodations is your primary residence. Your answer must be in the space provided on the reverse side of this form. If you answer "yes," you must sign the statement at the bottom of the reverse side with ink. Both the original and one copy must be signed by you and returned to this office within seven days from the date appearing at the bottom of this notice.

JUL 20 1972

(Date of Mailing) (District Rent Director)

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(FOR DISTRICT RENT OFFICE USE ONLY)

PART C — THE ORDER

After consideration of all the evidence in the record, and upon the grounds stated in Section 18 of the Regulations, the District Rent Director [only box marked "X" is applicable]:

A [X] FINDS that the housing accommodation referred to in item 3, above, is not occupied by the tenant as his primary residence and it is therefore ORDERED that said housing accommodation be, and the same hereby is, decontrolled.

B [ ] FINDS that the housing accommodation referred to in item 3, above, is occupied by the tenant as his primary residence and it is therefore ORDERED that the within application be, and the same is hereby denied and said housing accommodation continues to remain subject to these Regulations.

C [ ] FINDS that the housing accommodation referred to in item 3, above, is not eligible for decontrol pursuant to Section 18 of the Regulations and said housing accommodation continues to remain subject to these Regulations for the reason that *(state grounds for denial if B, above, is not applicable)*.

R.C. Shea

Issued: SEP 7 1972 19?

District Rent Director

APPLICATION FORM A-18 (See Reverse Side)

DATE OF ENTRY	EXAMINER'S FINDINGS AND COMMENTS (Continued)	FOLLOW-UP DATE
9/7/72	A review of the facts in this case indicate that the subject apartment is not being occupied by the tenant as his primary residence and that same is not part of a duplex unit. Therefore, it is recommended that an order be issued decontrolling the subject apartment #1F at 209 E 83 St. Mgr. on the grounds that it is not being occupied by the tenant as his primary residence. Note code enforcement violation on one D.U. not for commercial use Letter from L/D dtd re: violations does not affect previous decision	

DATE EXAMINED BY

PLAINTIFF EXHIBIT U. S. DIST. COURT S. DIST. N.Y.

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HOUSING AND DEVELOPMENT ADMINISTRATION
ALBERT A. WALSH, Administrator Andrew P. Kerr, Administrator

The City of New York

Department of Rent and Housing Maintenance
NATHAN LEVENTHAL, *Deputy Administrator/Commissioner*

Office of Rent Control
110 CHURCH STREET, NEW YORK, N. Y. 10007

[illegible], *Deputy Commissioner*
DANIEL W. JOY, *General Counsel*

December 15, 1972

Mr. Prescott Bathborne
200 East 53rd Street
New York, New York

Re: Protest Docket No. CPTA 12140
Premises: 200 East 53 Street
New York, New York
Apartment No. 4

Dear Sir:

We are in receipt of a letter from the landlord's attorney advising us that you vacated both apartments in the above matter (formerly designated as Apartments 4 and 5) and that by reason thereof the landlord requests that your protest be denied.

If it is true that you have vacated the apartments in question then the protest proceeding becomes moot. Accordingly, please be advised that if we do not hear from you by December 22nd, we will assume that you have, in fact, vacated the subject apartments in which event we will issue an order dismissing your protest in this proceeding.

Very truly yours,

BERTRAM SUSSMAN
Chief Protest Attorney

by: I. Ehrlich
Assistant Counsel

IE:pc

cc: Max Steinberg, Esq.
6 East 45th Street
New York, N.Y. 10017

Bradley B. Davis, Esq.
1235 Park Avenue, New York, N.Y. 10028

PLAINTIFF

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

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THE CITY OF NEW YORK
HOUSING AND DEVELOPMENT ADMINISTRATION
DEPARTMENT OF RENT AND HOUSING MAINTENANCE
OFFICE OF RENT CONTROL
110 Church Street
New York, New York 10007

----------X

IN THE MATTER OF THE PROTEST OF : Protest Docket No. CPTA 12,140

: D.R.O. Docket No. 2DPR 212

PRESCOTT RATHBORNE :

:

Applicant

----------X

ORDER AND OPINION DISMISSING PROTEST

On October 3, 1972 the above-named applicant-tenant filed a protest against an order issued on September 7, 1972 by the District Rent Director of the Lower Manhattan District Rent Office, which declared the housing accommodation known as Apartments 4 and 5 in the building at 200 East 53rd Street, New York City to be decontrolled.

On December 17, 1972 the landlord through his attorney notified the Office of Rent Control that the tenant vacated the subject accommodation. The tenant, although advised by the Office of Rent Control of the landlord's aforesaid statement of December 17, 1972, has failed to rebut the said allegation as to the tenant having vacated the subject accommodation although he was requested to file such rebuttal by December 22, 1972 if the said allegation was untrue. There is, therefore, no issue to be determined in the matter.

Therefore, in accordance with the provisions of the City Rent Law, as amended, and the Rent Regulations promulgated thereunder, it is

PLAINTIFF

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

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ORDERED, that this protest be, and the same hereby is, dismissed.

ISSUED DEC 29 1972

s/ Nathan Leventhal
NATHAN LEVENTHAL
Commissioner
Department of Rent and
Housing Maintenance

I hereby certify that this is a true copy of an order issued on the above date.

s/ Joseph Bilello
JOSEPH BILELLO
Certifying Officer

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THE CITY OF NEW YORK
HOUSING AND DEVELOPMENT ADMINISTRATION
DEPARTMENT OF RENT AND HOUSING MAINTENANCE
OFFICE OF RENT CONTROL

PROTEST to The Commissioner of the Department of Rent and Housing Maintenance

by PRESCOTT RATHBORNE [~~landlord~~] [tenant]
(delete inappropriate designation) from an ORDER
issued ..... 197.....
and bearing Docket No. .....

PROTEST

Address of Housing Accommodations
200 East 53rd Street
Borough of Manhattan Apt. No. 4

INSTRUCTIONS: See reverse side for advisory information. Complete all items below.
If more space is needed, attach rider and identify by item number.

a. I, the undersigned, am the [~~landlord~~] [tenant] and [~~owner~~] [occupy] *(delete inappropriate designation or statement)* premises number 200 East 53 Street *(insert address of subject building)*, located in the Borough of Manhattan, City of New York. My post-office address 200 East 53 Street, New York Zip Code 10028

b. The names and post-office address of all parties affected by this Protest are as follows:
873 Third Avenue Corp. (Landlord)
c/o Max Steinberg, Esq.
6 East 45 Street, New York, N.Y. 10017

c. My objections to the Order are as follows:

I vehemently object to the order issued by the District Rent Office on September 7, 1972, without any hearing or even any inspection of the premises, decontrolling a part of my apartment on the ground that it is not my principal residence and not part of a duplex apartment.

Had a hearing been held, or had anyone from the District Rent Office even bothered to look at my apartment, they would have found that what I occupy is indeed a duplex apartment and is my principal residence, as the Department of Buildings inspector found as per the attached.

Apparently, prior to my occupancy in 1966, the apartment I occupy was two apartments and designated as apartments 4 and 5 on the certificate of occupancy. However, it was rented to me as one apartment and has always been so used. There is only one entrance to the apartment, only one kitchen, and, indeed, only one bedroom. The apartment is on two floors and therefore is a duplex. I reside in the apartment and no where else, and do not and never have used the apartment commercially. Since 1966, my only source of

(continued on separate sheet)

d. The Order should be [reversed] [~~modified~~] *(delete inappropriate statement).*

e. Notice is hereby served on the [landlord] [~~owner~~] that he may within 15 days from the date of service of this Protest, file an affirmed answer thereto by filing the same with the Principal Office of the Office of Rent Control, 110 Church Street, New York, N.Y. 10007, together with proof of service of a copy of the answer upon the party filing the Protest.

AFFIRMATION

I have read the foregoing and I hereby affirm under the penalties provided by law that the contents thereof are true of my own knowledge.

It is not necessary that the foregoing be sworn to but false statements may subject you to the penalties provided by law.

(X) .....
(Signature of Petitioner)
Dated September 27 1972

PROOF OF SERVICE

The undersigned affirms that (s) he resides at No. 415 East 52nd Street, New York, N.Y.
Borough of Manhattan, City of New York and that (s)he is over 21 years of age.
On the ..... day of September 1972 (s)he served upon the following named person(s) 873 Third Avenue Corp., Landlord, a copy of this Protest by depositing the same, properly enclosed in a post-paid wrapper, in the post-office letter box regularly maintained at F.D.R. Station, 10022 directed to the following named person(s): 873 Third Ave. Corp., c/o Max Steinberg, 6 East 45th Street, New York, N.Y. at the addresses within the State designated by them for that purpose or the place where they kept an office, between which places there then was and now is a regular communication by mail.

It is not necessary that the foregoing be sworn to but false statements may subject you to the penalties provided by law.

..... (Signature of Server)
Dated September 27 1972

APPLICATION FORM A-96 (Rev. 1-71) *(See reverse side)*

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PLAINTIFF
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
60-29

PROTEST OF PRESCOTT H. RATHBORNE
200 East 53rd Street, New York, N.Y.
Apt. 4

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income has been dividends and royalties from property owned by my family in Louisiana. All of this could be established at a hearing which I was never permitted to have.

Although "apartments 4 & 5" have been one apartment for at least the past 6 years, the landlord never filed to change his Certificate of Occupancy as he should have. Now he is attempting to take advantage of his own violation of law by claiming that because the certificate of occupancy shows two separate apartments, there are in fact two separate apartments andtherefore one cannot be my principal residence. If anything, the landlord should be fined for not filing a certificate of occupancy amendment to conform to the true situation which, I once again emphasize, can be observed quite simply by inspection of the premises. The intent of Section 18 of the Regulations certainly was not to decontrol half of an integral apartment which is used as a primary residence. In June of 1972, just after the within petition was filed, my lawyer received the attached letter from the landlord's lawyer, asking to "restore the stove and refrigerator" to my apartment. Needless to say, as per the attached, my lawyer advised that no stove and refrigerator had to be "restored" because I already had one kitchen which was all I needed. I, of course, am now aware that the reason for this correspondance is that the landlord wanted to show that there were two apartments, and one way he thought he could do this was showing that there are two kitchens. Needless to say, there are neither two kitchens nor two apartments.

I cannot understand how the District Rent Office determined, again without any hearing or inspection, that "apartment 4" was not my principal residence while "apartment 5" is. For one thing, apartment 5" cannot be reached except by going through"apartment 4". However, the latter "apartment" is far more valuable to the landlord because it is on a lower floor and has a large roof-terrace. Undoubtedly that is why he sought decontrol of the apartment.

It is completely impossible to understand the motivations of the landlord without knowing the situation on the block where I live. For some time, major real estate interests have been accumulating property on the block in order to construct an office building. I am attaching herewith a copy of an article which appeared in New York Magazine. You will note that the building where I live is one of the properties which have been purchased by these interests (at a hearing, I can corroborate this by written documents) and moreover being at a subway corner, is crucial to this assemblage. As long as I am a rent-controlled tenant in the building with no interest in moving, they cannot complete the assemblage. Therefore, they have resorted to every imaginable subtrefuge, legal and illegal, to drive me and other rent-controlled tenants who do not wish to move from their homes. In my case, it involved such matters as depriving me of electricity for an entire month, depriving me of any door buzzer system, axing my front door, and continually threatening my life. The block itself now houses no less than 8 "drug rehabilitation" centers, and,needless to say, the street, which until quite recently was quite elegant, has become a haven for drug pushers, prostitutes and other degenerates. Those buildings where the developers have succeeded in driving tenants out have been "tinned", making them not only unsightly but a haven for addicts, muggers and rats.

Among the procedures I have followed trying to protect my home was to file an harassment proceeding with your office. A copy of that proceeding is attached herewith. However, while it had been filed long before the decontrol application by the landlord, no action has been taken on it, and was not even considered by the District Rent Office when the decontrol application was under consideration although I am advised that this harassment by itself, if proven, is sufficient to deny this application.

Moreover, in denying me even the right to a hearing to prove my case, I believe my fundamental constitutional rights have been abrogated. It was impossible for me to prove that in fact I occupy only one apartment and that this proceeding has been brought only because the other harassment methods have failed when no one from the District Office allowed me any such opportunity.

PRESCOTT RATHBORNE

were made to you directly, to either you or to the plaintiff?

A Well, there were ongoing conversations with Mr. Steinberg himself. There were in the cases I mentioned, I had over twenty court appearances in 1972 and telephone conversations. The nature of the statements were similar to what I have testified to. I can't specify other than what I have told you specifically.

Q Statements that were made to you when Mr. Rathborne was not present, did you tell Mr. Rathborne what was told to you?

A Oh, yes, yes.

Q Did you ever tender rent to Mr. Garfinkel on behalf of Mr. Rathborne?

THE COURT: He testified that he did not.

A Other than in the court proceeding, there was a tender in one case where there had been a prior refusal in court. The rent was paid by me; otherwise, no.

Q And now, with regard to -- when you came to the building to see Mr. Rathborne, how did you gain access to the building?

A Well, at first I had to go to the corner and make a phone call because there was no working buzzer system to get into the building. That lasted for about a year. After June of '72, the lock was removed, I simply opened

the door to gain access to the building.

THE COURT: I don't understand about this buzzer system. Couldn't Mr. Rathborne have installed a buzzer?

A I doubt, even though he legally could under the lease, it was the landlord's obligation.

Q (By Mr. Jacobs) It's the outside door of the building, not to his apartment?

A It was a single door to the street which is not only to Mr. Rathborne's apartment, but others.

THE COURT: How many places are there in the building?

THE WITNESS: There were at least three other places. I never explored it.

THE COURT: How did those people get in?

THE WITNESS: Well, Mr. Rathborne had a key. So, that's how he got in. How visitors got into these other people's apartment than by telephone calls, I have no idea.

THE COURT: Was Mr. Rathborne treated any differently than other people?

THE WITNESS: I don't know the other people. I have no idea.

Q Now, with regard to the lock, was there a lock on the door downstairs?

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A Until June of 1972, yes.
Q Then what happened?
A Then it was removed. There was a hole in the door downstairs.
Q Was that hole still there when Mr. Rathborne moved out?
A Yes.

MR. JACOBS: I have nothing further.

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. STEINBERG:

Q Mr. Davis, where are you residing now?
A 1235 Park Avenue, New York City.
Q Did you give up the practice of the profession of law?
A Yes.
Q Voluntarily or involuntarily?
A Involuntarily.
Q When did that happen?
A That happened in the spring of 1973.
Q Mr. Davis, in response to the Court's question about the number of actions instituted by you, didn't you omit a rather significant action instituted in the Supreme Court on the same ground as instituted in this court?
A Not to my recollection.

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EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

48-dl

OFFICE OF RENT CONTROL | New York, N. Y. 10007 | Docket No.

TENANT'S STATEMENT OF VIOLATIONS — HARASSMENT

DECLARACION DEL INQUILINO POR VIOLACIONES (HOSTIGAMENTOS)

PART I (Must be filled in completely in every case) — *PART I (Debe ser llenada completamente en cada caso)*

1. MAILING ADDRESS OF LANDLORD:	2. MAILING ADDRESS OF TENANT:
NAME 873 Third Avenue Corp. TEL. NO. MU-6-1582	NAME Prescott Rathborne TEL. NO. PL-5-0100
NUMBER AND STREET c/o M. Steinberg, Esq. 6 East 45th Street	NUMBER AND STREET 200 East 53rd Street
CITY, STATE AND ZIP CODE New York City, N. Y.	CITY, STATE AND ZIP CODE New York City, N. Y.

3. ADDRESS OF SUBJECT BUILDING:		4. APARTMENT OR ROOM IDENTIFICATION	5. NUMBER OF	
			Rooms	Occupants
200 East 53rd Street,	New York, N. Y.	#4 and #5	5	1
(Number and Street)	(Borough, State and Zip Code)	(As "No. 3," "second floor front," etc.)		

6. .....
(Insert an address where you can be reached if you leave your present address)

FILING INSTRUCTIONS: An original and two copies of this application must have Parts I, IV, V and VI (if required) completed and filed together with accompanying documents, if any, with the Chief Enforcement Officer, at the address indicated above, by delivery or mailing. Before filing the application be sure to sign the original and all copies.

PART II — DEFINITION OF HARASSMENT

Harassment is defined in the Rent Law and Regulations as any course of conduct, including the interruption or decrease of essential services which interferes with a tenant in the use of his housing accommodation, *with intent to cause such tenant to vacate his apartment or WAIVE HIS RIGHTS under the Rent Law. Retaliation* is defined as the removal or attempted removal of the tenant from his apartment because such tenant has taken or proposes to take action authorized or required by the Rent Law or Regulations.

There must be a continuing course of conduct, as distinguished from an isolated incident, such as the breakdown of the boiler or elevator. There must be wilful interruption in services and objective supporting evidence that such conduct is intended to or has resulted in making tenants move from their apartments.

This complaint of harassment is not to be made because of the landlord's failure to paint or decorate, or to supply heat and hot water, except when it happens a number of times and is clearly an attempt to make you and other tenants move out of the building.

Persons using this form may be summoned to testify under oath in court or before this office in connection with criminal or civil action initiated on the basis of the statement contained in this statement. To register a painting complaint, file application form A-34.2P; for all other service complaints, file application form A-34.2S. Complaints of violations such as overcharge, bonus, furniture tie-in, security deposit, etc., should be filed on application form A-60. Appropriate forms may be obtained at your local District Rent Office.

(For Principal Office Use Only)

PART III — NOTICE TO SHOW CAUSE

TO: THE LANDLORD INDICATED ABOVE:

This is a statement of violations filed by your tenant which, if true, indicates that you are engaging in a course of conduct constituting harassment.

Now, therefore, you are hereby required to SHOW CAUSE before the Office of Rent Control at an informal hearing to be conducted at its Principal Office located at 110 Church Street, New York, N. Y., on _____ 197__, at _____ A.M., P.M., WHY a finding of harassment pursuant to §Y51-11.2 of the Administrative Code and Section 61 of the Regulations should not be made against the housing accommodation affected by this application.

Date of Mailing: **Chief Enforcement Officer**

PENALTIES FOR PROVEN VIOLATIONS: Persons adjudged guilty of harassment and illegal or constructive eviction may be prosecuted as a crime punishable by imprisonment for not more than one year or by a fine up to $5,000, or both. In addition, a permanent injunction against future violations of the Rent Law may be obtained and a civil fine of up to $1,000 may be levied by the Administrator for each violation.

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IF, AFTER READING THE ABOVE DEFINITION YOU BELIEVE A COURSE OF CONDUCT HAS OCCURRED WHICH CONSTITUTES HARASSMENT PLEASE CHECK AND COMPLETE ONLY THE FOLLOWING ITEMS APPLICABLE TO YOUR COMPLAINT.
(Esta Solicitud debe ser escrita en Ingles)

7. Date you took occupancy: 1966 Current rent charged: $500 monthly
8. Is rent being accepted? yes ☒ no ☐. Are receipts being given? yes ☐; no ☒.
9. Give total number of apartments (units) in building: occupied 4, vacant
10. If there are vacant apartments (units), indicate whether they are locked, boarded up or being altered:
11. Have you been notified that the building is scheduled for demolition or alteration? yes ☒; no ☐.
12. Is a "work permit" from the Department of Buildings on display? yes ☐; no ☒.
13. Is there a tenant's committee in your building? yes ☐; no ☒ If yes, indicate Name, Address and Telephone Number of the Chairman of the Committee.
14. Are you willing to testify in court against your landlord? yes ☒ no ☐.

PART V — NATURE OF HARASSMENT COMPLAINT

(Mark X in appropriate box and give specific details, such as dates, places, acts or statements made by your landlord or his agent which you claim were intended to harass you.)

15. ☐ I was offered $ by (name) to vacate my apartment by (date) 197
16. a. ☒ I was threatened with eviction if I refused to vacate my apartment. b. ☒ I was told that essential services would not be provided.
c. ☐ I was offered another apartment. d. ☐ After I refused the offer, the services were decreased.
e. ☐ After I refused the offer, I received threats of eviction from (name) (State details in Part VI).
17. ☐ I was served with legal dispossess papers (attach copy).
a. ☒ I retained a lawyer. Give name and address Bradley Davis, 1235 Park Avenue, New York 10028
b. ☐ Claim against me is untrue for the reasons set forth in Part VI, also give status of legal proceeding.
18. ☐ My landlord is retaliating against me because:
a. ☐ I filed the following applications with the Office of Rent Control:

Docket No.	Date	Disposition

b. ☐ I filed complaints with the Office of Code Enforcement on (Dates)
c. ☒ Other (Describe by nature and date of action taken by you against landlord in Part VI)
19. ☐ I have been illegally evicted, "locked-out" or otherwise excluded from my apartment.
20. ☒ Personal property in my apartment has been damaged, destroyed or removed by:
a. ☒ Landlord or agent. b. ☒ Lack of adequate security in building. c. ☐ Illegal eviction of tenant.
21. ☒ Did you take or do you propose to take any legal action against your landlord for the illegal eviction or damage to your property? yes ☒; no ☐.
22. ☐ Landlord has intentionally decreased, withheld or interrupted the following essential services: heat ☒; hot water ☐; cold water ☐; electricity ☒; superintendent or janitor ☒; garbage ☒; or elevator ☐. Give date and duration of each interrupted service in Part VI.

PART VI — FURTHER STATEMENT OF TENANT *(OTRAS DECLARACIONES DEL INQUILINO)*

(State in this space all the additional facts which may assist the Chief Enforcement Officer)

The reason, I believe, for the incredible harassment being imposed upon me is that the block on which I live is being assembled for an office building. The apartment I occupy is in a key building because it is at the corner of 53rd street and third avenue. Since each building is "bought" by a different nominal landlord, it is not easy to prove the assemblage. However, it has been shown in New York Magazine of August 30, 1971, my building being in fact one of those purchased by the speculators. On the block, there are many boarded-up buildings and no less than six "drug rehabilitation" centers which is one of the major weapons used by assemblers to deteriorate a block so that tenants will be forced to move.

I have read the foregoing and I hereby affirm under the penalties provided by law that the contents thereof are true of my own knowledge.
Declaro conforme a la ley que he leido lo antecedente cuyo contenido es verdico.

It is not necessary that the foregoing be sworn to but false statements may subject you to the penalties provided by law.

No es necesario que el documento sea bajo juramento; sin embargo, declaraciones erroneas pueden resultar en un delito de acuerdo con la ley.

(Signature of Tenant)
(Firma del Inquilino)

Dated *(Fecha)*..... 197....

I will list only the most major harassments which I have suffered; in fact, virtually my entire life in the building has become a harassment.

(1) Although my lease specifically required it, and although I understand it in any event is required by law, there is only a single door to the building with no buzzer connection to the apartment. Therefore, either the door is locked, in which event I cannot admit visitors to my apartment, or it is open in which case drug addicts and other degenerates can and do wander into the building. I have no control over whether it is locked or opened. Moreover, part of my apartment is a roof-terrace which opens directly upon my living room; recently, the landlord has instigated the fire department to file a violation against a lock I have at the top of a staircase leading to the terrace. I do not know the technicalities of the fire law, but I do know that the landlord has filed this complaint because if I have to remove the lock there will be direct access from the street to my apartment to anyone who wishes to enter, simply by walking in through an open front door, walking up the staircase to my terrace, and entering through the terrace door.

(2) For this entire month, my electric supply has been shut off. I called Con Edison, but they said there was no wiring problem, that the problem was the landlord's domain. The fuse box and other essentials to provide me with electricity are in the landlord's possession.

(3) Several weeks ago, my front door was axed. I asked the landlord to repair it, but he refuses to do so. On several occasions since, I have found kitchen grease poured all over my front door. This undoubtedly is being done to harass me, but I cannot prove it because the unlocked front door means everyone can wander in and out of the building as he pleases.

(4) On many, many occasions the landlord has threatened my life if I do not move out of the building. I have witnesses to a number of these occasions.

(5) My plumbing is defective and my roof is leaking. The landlord refuses to make any repairs.

(6) Because of the strange way the building is constructed, the front door to my apartment is on a different floor than my apartment. Therefore, by terms of the original lease, the landlord was required to install a speaker system from that door to my living room. That speaker has been broken for months but the landlord has refused to fix it. This, of course, is a different door than the front door to the building where such a system, although required has never been installed.

(7) The halls in the building are virtually never cleaned and garbage piles up on the sidewalk outside.

(8) I have been receiving mysterious telephone calls at odd hours of the night. Because of all of the above other harassments, I suspect my landlord although I cannot prove this. I know that this is a method routinely used by landlord trying to drive tenants out of buildings.

I do hope that the rent commission will give me some assistance. All I am asking is that I be allowed to live in my apartment in relative peace. I know, however, that the landlord has no intention of allowing this because he wants me out of the building, and only your assistance can protect me.

—PRESCOTT RATHBONE—

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HOUSING AND DEVELOPMENT ADMINISTRATION
ANDREW P. KERR, *Administrator*

Department of Rent and Housing Maintenance
DANIEL W. JOY, *Deputy Administrator/Commissioner*

Office of Rent Control
110 CHURCH STREET, NEW YORK, N.Y. 10007

CARL A. HOLE, *Deputy Commissioner (Acting)*
HARRY MICHELSON, *General Counsel*

November 12, 1973

Prescott Rathborne
200 E. 53rd St.
New York, N.Y.

Re: Landlord: 873 Third Ave. Corp. c/o M. Steinberg, Esq.
Case No.: 2240-HL
Premises: 200 E. 53rd St. N.Y.C.

Dear Tenant:

We are in receipt of your complaints that you have suffered harassment by your landlord. We trust that the situation has been resolved. However, in the event that it is continuing, please contact the undersigned immediately. If we do not hear from you within the next seven (7) days we shall presume that no further legal enforcement action is required and we shall close our file.

Thank you for calling our attention to this matter.

Very truly yours,

VICTOR BRAUNSTEIN
Acting Chief Enforcement Attorney

BY: STUART MARCUS

Assistant Counsel
Telephone: 566- 4264

Advise if all is ok?

Should you advise HDA
I moved or at. your address

46 id

251A

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July 13, 1972

Received from Priscott Rathborne $400 for full payment of protection dog Black Male Doberman Pinscher Damasyn the Frontrunner, AKC # WC 79806.

Mr. Rathborne has the right to return the dog within 15 days from the date of purchase. Full price will be refunded if the dog is in the same condition as when sold.

Carol Selzler and Lucy Meyer retain the right to breed any of their bitches to this dog without payment of a stud fee.

Carol Selzler

Linda 516 732 7251

PLAINTIFF'S
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

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252A

SURVIVAL GARDENS

Survival Gardens was located at 200 East 53rd Street. Its unique and unparalleled achievement was to experiment and grow all kinds of outdoor plants and to ensure that they survived.

Survival Gardens existed primarily due to the relatively favorable environmental conditions. It was in a protected area excellent for plant breeding. Strong winds were screened out by buildings opposite and adjacent to it. Temperatures in the area were warmer than those of Central Park and Long Island because of the heat absorbed during the day by the buildings. Rainfall was sufficient, but an automatic sprinkler device was also employed to ensure that the plants received the proper amount of water during the dry seasons. Rain did not come down heavily and destructively onto Survival Gardens as the adjacent building prevented such natural disasters.

Most impressive , perhaps, is the the fact that under normal conditions plants between zones4,5 and 6 of the Plant Hardiness Map can thrive in New York City. But in Survival Gardens, plants of zones 2,3 and 7 showed fantastic growing results.

Mr. Rathborne had a fine and rare collection of plants. He did not only have woody plants but also a collection of annuals, biennials and perennials as well as ferns collected from different parts of the country and of the world.

The interior of the building had two glassed sunroofs which provided ideal lighting for indoor plants. Once inside, different spicies and varieties of climbing and creeping vines presented a spectacular view. At night, the vines could be seen through the glass roofs from the bedroom,

PLAINTIFF
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
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living room, two halls, and kitchen when the lights came on. The vines had been specially and carefully tended through years of patient and loving care for them. Mr. Rathborne's personal interest in horticulture had led him to invest a tremendous amount of time, effort and energy in educating and familiarizing himself with his vegetative collection.

Ecology was an important concern of Survival Gardens. Mr. Rathborne had different vital plants like the European Cranberry, Red Chokeberry and many others which help support the diet of birds. It was little wonder that the Red Winged Raven informed the tenent of the arrival of each Spring.

It is an imprisoning experience to walk along 53rd Street. Grey black walls pierce up against the skyline like giant fists grabbing everything in their sight. But the sheer green physical reality of Survival Gardens was the most heart-warming sight to cheer up any pair of eyes.

There was a well-planned and well-kept flowering sequence in the front row of redwood boxes facing the street. Flowers bloomed as early as February 24th, while the Japanese Witchhazels are one of the last shrubs to flower in the year.

Survival Gardens was conceived and nurtured on a former bare black spot on a second floor. It was designed to combat the dominant concrete walls in the area and to present a refreshing contrast to the whole neighborhood. 244 linear feet of the best red wood and 24 tons of top soil were used in its construction besides decorative items, steel pipes, and bluestone flooring. The installation was a gigantic task. An illustration will show the work involved. For instance after being cut into the proper dimensions every strip of the redwood board had to be handscrewed at intervals of 6 inches to ensure support for the soil pressure it held back. Therefore, each 6 feet by 2 feet board had to be handscrewed 488 times.

The maintainence of Survival Gardens took great pains and trouble. Shrubs and small trees had to be pruned frequently to secure the best results in foliage growth. Annuals were removed as the blooming periods were over so that other flowering plants could thrive with best results.

The Japanese-style rock garden pool was an intrinsic feature of Survival Gardens. Exotic ferns surrounded the entire periphery of the pool. Water dripped down as though it were natural spring emerging from a mountain-side. Its gentle trickle lent a subtle aura of quietude to the whole environment.

Biological control of insects was practised in Survival Gardens. The Praying Mantid was introduced as it preyed on other insects that caused damage to the vegetation. This "natural balance" theory was complemented by the installation of neon-white and neon-blue lights so as not to attracts in the evening. Arsenical insecticides were used to prevent the shade and ornamental plants from injury.

The plants that were used at Survival Gardens played a small part in supplying oxygen to living creatures in the neighboring areas.

It is almost impossible to cite the replacement value of the the total collection of Survival Gardens. It took five years in the making and is an irreparable loss for nature lovers and everyone alike.

MORNING SESSION

October 21, 1974
11:00 a.m.

MR. JACOBS: Good morning.

MR. STEINBERG: Good morning.

THE COURT: Good morning. Are you ready?

MR. JACOBS: I am ready, Your Honor.

THE COURT: Where are all your witnesses?

MR. JACOBS: Your Honor, I want to ask at this time about your outlined procedure of underlining all the portions of the depositions of my client that I submit is relevant. The problem I have is with adding other things to that continuity.

THE COURT: I have read the depositions.

MR. JACOBS: Yes.

THE COURT: I have read all the depositions.

MR. JACOBS: But I did not examine my client at the deposition.

THE COURT: You don't need to cover things covered by deposition. Go ahead and put on your witnesses. I don't want any stalling.

MR. JACOBS: I have eight other witnesses coming in today.

THE COURT: What time?

MR. JACOBS: I have three others coming in this

morning.

THE COURT: I will let you call them all; but, you are not going to go over things covered in the deposition. This case is going to be finished this afternoon.

MR. JACOBS: I should hope so, Your Honor. My client will give us the broad picture. The other people will testify in smaller areas. I mean both of them are short witnesses. But I think I should be able to go forward.

THE COURT: I am going to let you put on your witnesses. I don't want a lot of irrelevant testimony and repetition. I worked for hours yesterday reading your depositions. I don't want to hear the same thing again this morning.

MR. JACOBS: I will attempt not to go over those same things.

THE COURT: Do you want to make an opening statement?

MR. JACOBS: Yes, Your Honor.

THE COURT: Go ahead.

MR. JACOBS: It is our position here, Your Honor, that plaintiff, who was a resident of a rent control apartment in the city of New York -- by that, I mean he was in an apartment which, although originally he only had a

Finally what happened was in the action that was brought on the air conditioning, the attorney for the plaintiff, who will testify, asked the judge for an order directing that there be access to the basement for the repairs to be made ----

MR. STEINBERG: Would you mind repeating that, sir?

MR. JACOBS: In the proceedings that had been brought ----

THE COURT: That lawyer will be here to testify?

MR. JACOBS: Yes.

THE COURT: What time is he coming?

MR. JACOBS: He will be here at two o'clock.

THE COURT: You had better telephone him and tell him to come in early. I told you yesterday when you run out of witnesses, you close your case.

MR. JACOBS: Your Honor, I have four witnesses for this morning.

THE COURT: If you are satisfied, that's all right with me.

MR. JACOBS: Now getting back to the electricity, finally when the court ordered access by the repairman who was hired by the plaintiff went down to the basement -- Your Honor, as Mr. Steinberg stipulated, the repairman found that the electricity had been tampered with.

THE COURT: Yes.

MR. JACOBS: Yes, Your Honor.

THE COURT: I have been trying to get you to put them in. I talked to you last week. I wanted you to put all your exhibits in.

MR. JACOBS: What does Your Honor mean by put them in?

THE COURT: Offer them right now. I don't have the time to be handing each exhibit to a person individually. That's why I asked you to come in last week. You assured me everything was all right; the case was ready to go. We didn't get the statements. We only got partial statements. They came to my hotel yesterday.

MR. JACOBS: I offered tentative statements of violations; Exhibit 48, an answer of Bradley Davis in a proceeding 873 Third Avenue against Prescott Rathborne; the order to show cause in the proceedings in the Munchtime case, Exhibit 50, the petition to decontrol, Exhibit 51; the answer of the petitioner, the tenant to the decontrol proceedings, Exhibit 52; the reply of the landlord, Exhibit 53; the decision of the hearings examiner, Exhibit 54; the answer of the landlord to the appeal or protest of the tenant, 55; a notice of stay of the order upon filing of the

protest, Exhibit 56; a letter from the Housing and Development Department after December 15, 1972 to Mr. Rathborne, 57; an order and opinion dismissing the protest, dated December 29, 1972, Exhibit 58.

THE COURT: How many more have you got? I think we had better postpone this until tomorrow morning so you will have an opportunity to put all these things in the documents and give them to counsel and let him object to any one he wishes.

MR. JACOBS: Your Honor, these are all documents, Your Honor, that were produced prior to trial.

THE COURT: I don't care about that. I told you what to do. I said I wanted you to list each and every exhibit that you had and give them to counsel so he would know which ones he wanted to object to. I am not condoning what Mr. Steinberg does. I think he is a difficult person. But, you are a difficult person also. I can see why this case went on the way it did because you two people are at each other's throat. Neither one wants to abide by the rules of the Court. You have refused time and again to abide by the rulings that I have made, so has Mr. Steinberg.

I read the deposition of Mr. Rathborne where he questions the right of a lawyer to ask him these

questions. Time after time he took a legalistic attitude. Why don't you try the case like a man instead of doing it the way you have been doing all along.

MR. JACOBS: I took a legalistic attitude?

THE COURT: Your client did. Look at the deposition. Day after day he refused to admit certain things [illegible]e true. Day after day he couldn't understand what the questions were. I can see he is a difficult person.

MR. JACOBS: Your Honor, if we could go ahead, I have one more witness, Dr. Casarino. We can take the testimony. As far as the exhibits go, Your Honor, I will present them to your chambers. I listed these exhibits. They were all on my list, every one.

THE COURT: I haven't got that list.

MR. JACOBS: It was in my order, Your Honor.

THE COURT: Did you present it to Mr. Steinberg for his approval?

MR. JACOBS: Your Honor, every single one of these were shown before.

THE COURT: Mr. Jacobs ----

MR. JACOBS: He is not objecting to any of these, Your Honor. Most of them are court documents.

THE COURT: Why are you wasting my time and calling out the names of each of these documents? Why didn't you put them in at the beginning of the case the way I have been asking you to do?

MR. JACOBS: Your Honor, I have tried a lot of cases. I don't know -- how do you put everything in at the beginning of the trial?

THE COURT: You mark them and be back here tomorrow morning. I will try the rest of this case. I don't like this kind of business.

MR. JACOBS: I am prepared to continue now.

THE COURT: You are not prepared to continue now because I have asked you to do things and you are arguing with me. You are telling me that I don't know how to try a case. Young man, I have been trying cases for 25 years. When I ask you to do certain things, I expect you to do it.

MR. JACOBS: I apologize if I did anything wrong. I thought this is what Your Honor wanted. I'm sorry.

THE COURT: You ask him any questions you want. He has a statement here. I read his statement. I have read all the exhibits. I have read all the depositions. What else do you want?

MR. JACOBS: Your Honor, one thing about Mr. Steinberg, you know, he has the opportunity to cross-

THE COURT: All right.

MR. JACOBS: Thank you.

THE COURT: You have taken a lot of extra time. This was not what we understood. This case might go over. If it doesn't finish tonight, I want you back tomorrow at 8:00.

MR. JACOBS: No problem. I will be here.

MR. STEINBERG: May I ask Your Honor, if my memory serves me right, you said something about staying late. If you are not going to stay late, I have a businessman I would like to discharge and tell him to come back tomorrow. I would like to call him first.

THE COURT: You can call him first. How long will your witness take?

MR. JACOBS: Probably five or ten minutes, Your Honor.

THE COURT: I am going to let you put him on later. Mr. Steinberg, call your witness.

MR. STEINBERG: The defendant would call Mr. Avolon.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRESCOTT H. RATHBORNE,

Plaintiff,

-against-

73-Civ. 612

CITADEL MANAGEMENT CO., INC., URBAN RELOCATION CO., INC., INC. S. GARFINKEL, EDWIN J. GLICKMAN, ODYSSEY HOUSE, INC., 873 THIRD AVENUE CORP. and SALBIAN REALTY CO., INC.,

Defendants

September 24, 1974
New York, New York

BEFORE:

The Honorable Gus J. Solomon, Sr. Judge, Sitting By Special Assignment in the Southern District of New York.

APPEARANCES:

Mr. Howard L. Jacobs, of Attorneys for plaintiff.

Mr. Max Steinberg, of Attorneys for defendants.

* * * * * *

THE COURT: Judge Brieant assured me the parties would be ready on short notice. Now you tell me that he informed you that you would have some time. The case is not ready to be tried. A Judge has the obligation to see to it that lawyers are prepared at the trial.

I am going to ask Mr. Jacobs, who represents the plaintiff, to prepare and present to Mr. Steinberg not later than Thursday, October 3rd, the following information:

First, a statement of the facts upon which plaintiff asserts jurisdiction against the defendant.

Second, the facts which he believes the defendant should admit.

Third, plaintiff's contentions of fact. This will be limited to the second cause of action. The first cause of action was dismissed pursuant to stipulation.

Fourth, the plaintiff's contentions of law.

Fifth, all exhibits plaintiff proposes to offer at the trial.

Six, plaintiff's statement on the issues of fact.

Seven, plaintiff's statement on the issues of law.

Eight, a list of witnesses whom plaintiff proposes to call at the trial together with a statement of the testimony of each witness. In other words, on the statement of Mr. Rathborne, I want a full statement of his direct testimony just as he would give it on the witness stand. In lieu thereof, Mr. Jacobs my underline the portions of the deposition of Mr. Rathborne that he proposes to offer at the trial and Mr. Steinberg will underline the portions he wishes to offer. If there is additional information, of course, it must be done by narrative statement. The same procedure should be followed on the other witnesses like Allen, Johnson etc.

The plaintiff should set out the qualifications of his experts.

Within one week after Mr. Steinberg gets this information, I want him to set out:

First, any objection he may have to the jurisdictional facts and what he believes those facts are.

Second, any objection he may have to the proposed agreed statement of facts and any additional facts which he believes plaintiff should stipulate to.

Third, he should set out the defendant's contentions of fact and law.

Fourth, he should set out the issues which he believes the Court must determine if they are different from those set out by the plaintiff.

Fifth, the defendant should set out the names of each of his witnesses and the testimony of those witnesses just as I required the plaintiff to do.

Both counsel should also set out the exhibits which they propose to offer and the objection which either one has to the exhibits offered by the other party and the reason for those objections.

Within three days thereafter, the plaintiff should set out any objections he may have to the affirmative matters set out in the defendant's answer together with any objections he may have to the exhibits which the defendant proposes to offer.

If either the plaintiff or defendant believes he is entitled to a summary judgment or dismissal or if the defendant believes the plaintiff has failed to assert a claim upon which relief can be granted, appropriate briefs should be filed. This should be done not later than five days after plaintiff has replied to the answering information of the defendant.

If you will do these things, you will be prepared for trial.

CERTIFIED TO BE A TRUE AND CORRECT TRANSCRIPT.

JERRY C. HARRIS
COURT REPORTER

Copy Received
Jan Stevens
Secretary for Rep's appellee
1/16/75
3:35 PM